RIGHTS TO PROPERTY, RIGHTS TO BUY, AND LAND LAW REFORM:

APPLYING ARTICLE 1 OF THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

RIGHT TO PROPERTY, RIGHTS TO BUY, AND LAND LAW REFORM

This dissertation examines the application and effect of Article 1 of the First Protocol to the ECHR in relation to Scots land law reform. Chapter one will reflect on why existing rights to property have come to be challenged. Chapter two sets out the human rights paradigm and scrutinises what rights and whose rights are engaged. Chapter three traces the development of A1P1. Chapter four applies the human rights paradigm to contemporary reforms. Chapter five considers the broader effect A1P1 has had on domestic property law.

This dissertation submits that the problem to be overcome is that, in many instances, Scots land law reform has been reduced into a simplistic struggle. A1P1 has been held up as either a citadel protecting landowners or as an ineffective and unjustified right to be ignored. At the core of this debate are competing claims between liberal individualist rights to property and socially democratic, egalitarian goals.

This dissertation argues that it is important to move beyond this binary debate. This is not about finding some mysterious "red card" or eureka moment that conclusively shows compatibility or incompatibility. Instead, compatibility will be determined by following a rule-based approach that values rational decision-making and the best available evidence, as well as the importance of democratic institutions. As such, it will be illustrated how future challenges are likely to focus not on the underlying purpose of land law reform but on the macro or micro granularity of Ministerial discretion. In coming to this conclusion, it will be argued that A1P1 has a pervasive influence on the entire workings of all public bodies and, like a dye, permeates the legislative process.

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DECLARATIONS

This thesis is submitted according to the requirements of the Degree Committee. It does not exceed the regulation length of 80,000 words including footnotes, references and appendices. It is the result of my own work and includes nothing which is the outcome of work done in collaboration with others, except where specifically indicated in the text and Acknowledgements.

The thesis uses the OSCOLA citation system (Oxford Standard for Citation of Legal Authorities).

Douglas S K Maxwell

(79,935 words, excluding bibliography)

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ABBREVIATIONS

Name	Abbreviation
Agricultural Holdings (Scotland) Act 2003	**AH(S)A 2003**
Agricultural Holdings Law Review Group	**AHLRG**
Agricultural tenants right to buy	**ARtB**
Agricultural tenants right to buy where landlord is in breach	**ARtBB**
Article 1 of the First Protocol	**A1P1**
Community Empowerment (Scotland) Act 2015	**CE(S)A 2015**
Community right to buy	**CRtB**
Convention on the Elimination of All Forms of Discrimination Against Women	**CEDAW**
Crofters (Scotland) Act 1993	**C(S)A 1993**
European Convention on Human Rights	**ECHR**
European Court of Human Rights	**ECtHR**
Human Rights Act 1998	**HRA**
International Covenant on Economic, Social and Cultural Rights	**ICESCR**
Land Reform (Scotland) Act 2003	**LR(S)A 2003**
Land Reform (Scotland) Act 2016	**LR(S)A 2016**
Land Reform Policy Group	**LRPG**
Land Reform Review Group	**LRRG**
Right to buy abandoned and neglected land	**RtBAN**
Right to buy for sustainable development	**RtBSD**
Scotland Act 1998	**SA 1998**
Scottish Land Commission	**Commission/SLC**
Scottish Land Rights and Responsibilities Statement	**SLRRS**
Travaux préparatoires	**TP**
United Nations Sustainable Development Goals	**SDGs**
United Nations Voluntary Guidelines on the Responsible Governance of Tenure	**VGGTs**
Vienna Convention on the Law of Treaties	**VCLT**

Scottish Parliament Committee Name	Abbreviation
Environment and Rural Development	**ERD**
Environment, Climate Change and Land Reform	**ECCLR**
Local Government and Regeneration	**LGR**
Rural Affairs, Climate Change and Environment	**RACCE**
Justice	**J**

1 TABLE OF CONTENTS

1. INTRODUCTION

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[1]
>
> Article 1 of the First Protocol to the European Convention on Human Rights

> Land reform in Scotland is hard to do at this time because of the European convention on human rights. I am not in any sense against the ECHR, but as we heard at the start of the debate, land reform post-ECHR tends to be focused on individuals' property rights… article 1, protocol 1 on rights in relation to property. That does not mean that we should not try to undertake radical land reform in Scotland— of course we should. Our constituents want it—my constituents want it and people across the country want it—but it is hard to do.[2]
>
> The Scottish Parliament, *Official Reports, Meeting of the Parliament*, 16 March 2016, col. 51. (Michael Russell MSP)

1.1 OVERVIEW

The establishment of the Scottish Executive in 1999 has resulted in twenty years of momentous land law reform. Arguably the most controversial part of this reform has been the introduction of legislation that gives communities, crofters, and agricultural tenants the pre-emptive and conditional right to purchase land and ancillary rights. The ability of states to expropriate property, whether directly or indirectly through third parties, is not a new phenomenon. This process is known by many names: compulsory purchase, eminent domain, and rights to buy. The ownership and distribution of land in Scotland has inspired passion and intrigue. It is this present-day discord that makes contemporary Scots rights to buy a particularly apt prism through which to examine the application and effect of the right to the peaceful enjoyment of possession in Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR").

[1] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, 213 U.N.T.S. 262 [hereinafter "A1P1"]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 [hereinafter "ECHR"].

[2] SP, OR, 16 March 2016, col. 51.

Land law and human rights were, for a long time, considered to be unconnected jurisprudential concerns. In particular, the native origins of land law and the conception of a land lawyer as a private lawyer made the supranational public law dimension of human rights appear quite unrelated. Prior to the Human Rights Act 1998 ("HRA") the ECHR only had a limited impact on Scots law. This has, however, changed with the Scotland Act 1998 ("SA 1998"), HRA and several high-profile Supreme Court decisions acting as catalysts for a small, but significant, shift in conceptions of what it is that a land lawyer does. The most visible manifestation of this shift in Scotland is observable in relation to contemporary land law reform.

When this thesis refers to land reform, it denotes the legislative mechanisms introduced by the Scottish Parliament to facilitate the transfer of existing title from one individual(s) or another or group(s). These reforms are inspired by notions of equality and the realisation of human rights, in securing greater diversity in land ownership and tenure, empowering communities.[3] While land reform is not confined to these rights to buy, they remain the best prism through which to consider the application and effect of human rights.

Legislative mechanisms that result in the expropriation of land and related rights have come into conflict with traditional conceptions of land ownership and the right to the peaceful enjoyment of possessions protected by A1P1. The result has been the emergence of a binary debate in which rights to property conflict with the Scottish Government's programme of distributive land reform. The ECHR has come in for sustained criticism by those who seek to advance the case of distributive reforms. To the Scottish Ministers, land reform activists, and associated groups, there remains a fear that A1P1 will serve as a "red card" to halt existing reforms. To others (primarily landowners and associated interest groups), A1P1 has been held up as a potential shield against "radical", politically motivated, state intervention. This thesis will show how this narrow debate misunderstands how A1P1 works in practice.

The human rights discourse has progressed in recent years to one that recognises "relevant non-convention rights", of which the most significant are the socio-economic rights contained in the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). This has been part of a concerted effort to broaden the human rights discourse in Scotland.[4] This thesis will analyse

[3] P. Peacock, *Land: For the many, not the few? Limitations on the Scale of Land Ownership* (Inverness: Scottish Land Commission 2018) p. 2.

[4] K. Shields, *Human Rights and the Work of the Scottish Land Commission* (Inverness: Scottish Land Commission 2018) p. 15.

A1P1 within this developing human rights paradigm.

1.2 STRUCTURE AND AIMS

1.2.1 CHAPTER ONE

This thesis is divided into 5 chapters. The first chapter sets out the "Scottish land question" and the legislative response. The purposes of chapter one is: first, to consider the reasons for the Scottish Government's introduction of the community and agricultural tenants' rights to buy; and second, to explain the legislative rights to buy thus enacted and the resulting mechanisms and processes by which community and agricultural tenants can purchase land. Chapter one considers the complexity of existing landownership and notions of the right to private property in land. Chapter one then sets out the legislative measures enacted by the Scottish Government.

1.2.2 CHAPTER TWO

The objective of chapter two is to determine what "rights" and whose "rights" are really at the core of land reform. Chapter two will illustrate the obligations to respect Convention rights placed on the Scottish government, judiciary and public and quasi-public bodies. It will set out the potential role for "relevant non-convention rights" and claims of native title to land in Scotland.

It will be submitted that the indivisibility of human rights means that the modern land lawyers must consider not only Convention rights, but also relevant non-convention rights such as the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Therefore, while human rights and public law were historically considered practically unrelated to land law, this is no longer the case as human rights and public law have come to pervasively influence the workings of modern land law.

1.2.3 CHAPTER THREE

Chapter three of this thesis will consider the drafting and subsequent development of A1P1. Chapter three will illustrate that, despite relatively inauspicious beginnings and often conflicting jurisprudence from the ECtHR, A1P1 has developed into a recognisable right to property that can be broken down into six component tests. Chapter three makes several important observations about the limits of A1P1: (i) possession has been given an autonomous meaning and, therefore, must be disassociated from its traditional domestic meaning; (ii) the lawfulness test requires Acts of the Scottish Parliament to be sufficiently accessible and foreseeable; (iii) the public interest test

has been rendered a paper tiger in the face of governmental intervention and is in practice left almost wholly to the discretion of democratic institutions; and (iv) proportionality has developed to embody four distinct principles that an interference must pursue a legitimate aim; be rationally connected to that aim; be the least intrusive measure undertaken to achieve that aim; and satisfy the fair balance between the competing interests of the parties.

1.2.4 CHAPTER FOUR

Chapter four applies the analysis in chapters one, two and three to contemporary rights to buy. Chapter four will argue that the existing debate, which tends to ask whether A1P1 will act as a "red card" to halt or limit existing rights to buy, misunderstands how A1P1 is given effect in practice.

Chapter four considers the test of who will constitute a victim, what constitutes a possession and when will an interference establish a control of use or a deprivation. The significance of this distinction is that deprivations, in all but exceptional circumstances, must be accompanied by compensation. Chapter four will consider the utility of the lawfulness and public interest tests and will evaluate the community and agricultural tenant's right to buy from the four-part proportionality requirement. It will be argued that contemporary rights to buy satisfy the legitimate aim test. Chapter four will discuss the rationality requirement resting on the Scottish Ministers when determining applications for community rights to buy and further legislative reform. It will be submitted that the principles of equivalence and just compensation will limit "radical" reforms but will accept that the ECtHR has, in exceptional circumstances, derogated from the full compensation standard.

The role of relevant non-convention rights, particularly the ICESCR, will be considered, and it will be asked what weight should be given to these international human rights standards when considering the question of the fair balance of an interference under A1P1.

1.2.5 CHAPTER FIVE

Chapter five of this thesis will consider what effect A1P1 has had on domestic property law. It will ask whether A1P1 mirrors existing entitlement, displaces or subordinates domestic law, or complements domestic law in a more nuanced manner. This is important because if A1P1 simply mirrors existing entitlement, the forceful rhetoric against A1P1 as limiting the Scottish Ministers' ability to legislate on radical land reform is misplaced. Further, it brings into view the complexities

of applying supranational human rights instruments to private law, and potentially raises questions of sovereignty and democratic legitimacy.

1.3 SIGNIFICANCE OF THIS THESIS

Although the application and interpretation of human rights and Scots land law reforms have been touched upon in political circles and reference has been made in the available literature, an extensive inquiry remains conspicuously absent. This thesis will therefore fill a critical lacuna and in doing so clarify existing confusions, inject a balanced analysis which has been most notably lacking, and introduce a level of theoretical abstraction and detail that has not yet been applied to A1P1 and Scottish land law.

There exists a great deal of misunderstanding concerning the application of A1P1 to contemporary reforms. There are numerous examples. In June 2018, Lord Drummond Young noted obiter in *McMaster v Scottish Ministers* that the grounds of appeal, in relation to A1P1, were "complex and somewhat difficult to follow".[5] Giving evidence to the Scottish Parliament, a representative from the NFU bemoaned that "if you ask three ECHR lawyers the same question, you will get three different opinions".[6] He noted that "on ECHR, I have sat down with lawyers, but whenever I meet them, I become more confused than ever. I would like the issues to be set out in layman's terms so that the industry can discuss them. That would be helpful".[7] It would be naïve to believe that this thesis can clarify such concerns in their totality, but it is hoped that, in undertaking this extensive research, a certain level of understanding can be articulated that is currently unavailable. This is not just relevant to the contemporary rights to buy but has wider implications for the application and effect of Convention rights. Simon Stockwell, giving evidence on the Long Leases (Scotland) Bill in 2012 stated that "we [Scottish Government Non-Government Bills Unit] have gone through the ECHR implications in some detail. To be honest, it has been the bane of my life at times".[8]

Within academic literature, political discourse, and during the legislative process, there is a conspicuous absence of balance when considering recent land law reforms in Scotland. Lord Hope cited this partiality at the legislative stage of the Land Reform (Scotland) Bill which became the

[5] *McMaster v Scottish Ministers* [2018] CSIH 40, GWD 22-271 [14].

[6] SP, OR, RACCE, 16 September 2015, col. 55.

[7] Ibid col. 54.

[8] SP, OR, RACCE, 8 February 2012, col. 602.

Land Reform (Scotland) Act 2003 ("LR(S)A 2003"). To Lord Hope "radical policies were being promoted by MSPs which were resisted by a significant body of public opinion on the grounds that it affected their rights and liberties".[9] The journalist Linklater, on reading through the various reports and committee meetings, noted that:

> As I began to read, I was struck by two things—first of all the blatant, and often self-confessed bias of its members against landowners, farmers and their representatives. Second, the almost wilful refusal to accept evidence which challenged the thrust of the Bill. Those who lobbied for open access to land, or who campaigned for wider distribution of property were listened to with respect and deference and often called back to give further evidence. Those who sought to defend the rights of property-owners were exposed to truculent and often offensive questioning.[10]

The Supreme Court exposed this one-sidedness in the seminal decision of *Salvesen v Riddell*, where a late and retroactive amendment to the AH(S)A 2003 was held to be an unjustifiable interference with the owner's rights to property under A1P1.[11] Lord Hope in *Salvesen* criticised the legislative process at Holyrood and observed that "[a] reader of what the Deputy Minister said during that debate might be forgiven for thinking that it displayed a marked bias against landlords".[12]

This partiality during the legislative process was apparent during a session on human rights regarding what would become the LR(S)A 2016. While giving evidence, one solicitor noted the possibility of the proposals contained in the Bill clashing with individual rights under the ECHR. The response was rather swift, to one MSP:

> I am struck by the word "progressive" because, with the greatest respect, looking at the Brodies opinion, I suspect that if Brodies had been asked to give an opinion on the Crofters Holdings (Scotland) Act 1886—fortunately, we did not have the ECHR at that stage—it would have been quite negative about it.[13]

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[9] D. Hope, "What a Second Chamber Can Do for Legislative Scrutiny" (2004) 25 *Statute Law Review* 3, 10.

[10] "Land reform falls foul of Scotland's own kangaroo committee" *The Scotsman* (Edinburgh: 1 December 2002).

[11] *Salvesen v Riddell* [2013] UKSC 22, 2013 SC (UKSC) 236.

[12] Ibid [38].

[13] SP, OR, RACCE, 7 October 2015, col. 10.

While Livingston was quick to respond that the rights contained in the ECHR apply to everyone, including landlords and tenants, this was ignored by the committee.[14] Distrust for experts and radicalism is never far from the debate.[15] To Wightman: "For too long the law has been the preserve of the lawyers… It is worth remembering that, particularly over local land issues, it is quite possible to become just as well informed if not more so than many so-called legal experts".[16] A 2016 study, commissioned by the Scottish Government, noted when considering the available literature on landownership patterns in Scotland that much of it had "radical land reform overtones".[17] When studying land reform literature in Scotland it remains essential to consider the source and context within which it was written.

1.3.1 PREVIOUS APPROACHES

In 1985, Walker lamented that in Scotland "the law of property was rather neglected".[18] Prior to the more recent revival of property law literature, most people relied on the Institutional Writers and Rankine's *The Law of Land-Ownership in Scotland.* Rankin even starts his 1879 text by noting that he was attempting to "fill up an admitted gap in the Scotch legal literature".[19] In an article in the LQR in 1959, Mann discussed the history of expropriation aiming to "stimulate others to do so".[20] However, this call to arms largely fell on deaf ears. While rights to property were considered by the Institutional Writers and leading figures of the Scottish Enlightenment by the middle of the 19th century, academic inquiry into rights to property and property law, in general, had become largely ignored.[21]

The last thirty years have borne witness to a revival in Scots property law literature. The works of Rennie at Glasgow, Carey-Miller and Paisley at Aberdeen, and Gretton, Reid, and Steven at

[14] Ibid col. 10-11.

[15] J. Hunter, *Towards a land reform agenda for a Scots Parliament,* (Second John McEwen Memorial Lecture, Dingwall 1995).

[16] A. Wightman, *The Poor Had No Lawyers* (Edinburgh: Berlinn 2011) pp. 4-5.

[17] S. Thomson et al, The impact of diversity of ownership scale on social, economic and environmental outcomes: Exploration and case studies CR/2014/19 (Edinburgh: The Scottish Government, 2016) p. 19.

[18] D. Walker, *The Scottish Jurists* (Edinburgh: W. Green 1985) p. 430.

[19] J. Rankin, *The Law of Land-Ownership in Scotland* (Edinburgh: William Blackwood and Sons 1879).

[20] F. Mann, "Outlines of a History of Expropriation" (1959) 75 *Law Quarterly Review* 188.

[21] K. Reid, "Property Law: Sources and Doctrine" in K. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland: Vol* 1 (Oxford: OUP 2000) p. 208.

Edinburgh have all contributed significantly.[22] When considering the law of agricultural holdings, it is difficult to overestimate the importance of Lord Gill and his seminal *Law of Agricultural Holdings* and *Agricultural Tenancies*.[23] Practitioners and courts are often found asking, "what does Gill say?". Similarly, concerning crofting law, Agnew QC's *Crofting Law* remains the most important text in the field.[24]

Despite the revival in property law, in general there remains relatively limited available literature on land law and A1P1 since the passing of the HRA in direct relation to Scots law. The most important work has been undertaken by Allen at Durham. Allen's *Property and the Human Rights Act* and additional work remain the most comprehensive consideration of A1P1 in the UK.[25] Important literature on the relationship between Convention rights and real property law in England is available in the works of Lees and Goymour both of Cambridge.[26] Significant contributions have also been made by McCarthy at Glasgow and Waring at Cambridge and more recently York, who published PhDs on rights to property in 2009 and 2010 respectively.[27] A more recent PhD thesis was published at Durham in 2016 by Kristoffer on A1P1.[28] As of writing, the literature on A1P1 and land law in Scotland reform remains primarily confined to analysis of the Supreme Court decision in *Salvesen*.[29]

The total number of articles published on Scottish land law reform are limited, but there are several papers and authors to highlight. Combe at Aberdeen has been the most prolific writer on land reform over the last ten years.[30] The American scholar Lovett while on leave at Edinburgh

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[22] K. Reid, *The Law of Property in Scotland* (Edinburgh: Butterworths Law, 1996); G. Gretton and A. Steven, *Property Trusts and Succession* (London: Bloomsbury 2013).

[23] B. Gill, *Agricultural Tenancies* (Edinburgh: W. Green 2017).

[24] C. Agnew, *Crofting Law* (Edinburgh: T&T Clark 2000).

[25] T. Allen, *Property and the Human Rights Act* (Oxford: Hart 2005); T. Allen, "Compensation for Property under the European Convention on Human Rights" (2007) 28 *Michigan Journal of International Law* 287; T. Allen, "Human Rights and Regulatory Takings" (2005) 17 *Journal of Environmental Law* 245.

[26] E. Lees, "Article 8, Proportionality and Horizontal Effect" (2017) 133 *Law Quarterly* Review 31; A. Goymour, "Proprietary Clams and Human Rights – A "Reservoir of Entitlement"?" (2006) 65 *Cambridge Law Journal* 699.

[27] E. Waring, *Aspects of Property: The Impact of Private Takings* (Cambridge University, PhD Thesis, 2009); F. McCarthy, *Article One of the First Protocol to the European Convention on Human Rights: the evolution of a right in Europe and the United Kingdom* (Glasgow University, PhD Thesis, 2010).

[28] D. Kristoffer, *On the Legitimacy of Economic Development Takings* (Durham University, PhD Thesis, 2016).

[29] D. Carr, "Not Law (But Not Yet Effectively Not Law)" (2013) 17 *Edinburgh Law Review* 370-376; A Fox, "Holyrood out of Bounds" (2013) 58(6) *Journal of the Law Society of Scotland* 28.

[30] See *inter alia*, M Combe, "The Environmental Implications of Redistributive Land Reform" (2016) 18 *Environmental Law Review,* 104-125; M Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" (2016) *Juridical Review* 291-313.

University published "Progressive Property in Action" which remains the sole detailed application of property theory to Scots land law reform.[31]

The narrative of land reform has been significantly shaped by the socialist theorist and forester, John McEwan. A treasure trove of passion can be found in the A. K. Bell Library in Perth which holds the personal archives of McEwan. The archive is full of newspaper cuttings, letters, and personal writings, often written on old envelopes or the back side of ripped out pages from copies of Hansard.[32] Very little was known about patterns of land ownership until John McEwan published *Who Owns Scotland* in 1977.[33] His work was to inspire the influential biennial John McEwen Memorial Lectures between 1993 and 1999 which were significant in shaping the modern land reform debate.[34]

Wightman's *The Poor Had No Lawyers*, first published in 2010, has been the most widely read text in recent years on the Scottish land question.[35] Wightman was elected as an MSP on 5 May 2016 for the Green Party in the Lothians. His political work combined with his writing and significant online presence have made Wightman the most prominent pro-land reform figure in Scotland.[36]

1.4 DEFINITIONS

There is a certain level of linguistic confusion that this thesis must attempt to overcome. In truth, however, the opaque and disputed nature of essential concepts such as "rights" and "property" will leave a residue of discontent. This is, in part, down to the multitude of diverse factors that go into our understanding of the basis of the peaceful enjoyment of possession in A1P1. It is not the purpose of this thesis to consider in detail the philosophical basis of "rights", "legal rights", and "human rights"; nor is it to turn into a debate between the underlying assumptions that can potentially determine whether one speaks of "property rights" or "the right to property". It is

[31] J. Lovett, "Progressive Property in Action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 740.

[32] McEwan Archive, A. K. Bell Library, Perth MS164/5/477 (Typed Notes in file Marx & Marxism Today).

[33] J. McEwan, *Who Owns Scotland? Study in Landownership* (Edinburgh: EUSPB, 1977).

[34] See B. MacGregor, "Land Tenure in Scotland" (First John McEwen Memorial Lecture 1993); J. Hunter, "Towards a Land Reform Agenda for a Scots Parliament" (Second John McEwan Memorial Lecture, 1995); J. Bryden, "Land Tenure and Rural Development in Scotland" (Third John McEwen Memorial Lecture 1996).

[35] Wightman, *The Poor Had No Lawyers* (n 16).

[36] A. Wightman, *Land and Power* (Edinburgh: Berlinn 1999).

important to accept these limitations from the outset, and also to set out (in brief) the linguistic framework that will be followed in the proceeding analysis.

1.4.1 LAND REFORM

It is an old joke that there is "no law" relating to land reform: this is based on the essential truth that most radical change in the world occurs through revolution and that the lawyers simply come in to tidy up afterwards. The process in Scotland has in practice been somewhat less radical than the debate often appears.

As a legal issue, land reform is amongst the most challenging possibilities of the law; to even define "land reform" in a succinct and coherent manner is not easy.[37] Land reform is about altering existing institutions and practices relating to land law and ownership to remove improprieties and promote efficiency. The problem is that such a straightforward definition is difficult to find in practice.

The Scottish Government has taken a broad approach. The Land Reform Policy Group ("LRPG") in 1998 stated that "the objective of land reform is to remove the land-based barriers to the sustainable development of rural communities".[38] For the purposes of this thesis, land reform refers to attempts to correct perceived market failures and land oligopolies by institutional reforms enacted or induced by public powers to facilitate systematic change in property distribution, size, and tenure. This is undertaken as part of a shift or rather a broadening of emphasis from a focus on wealth creation to a recognition of the importance of effective local democratic governance.[39] The significance of land reform in Scotland should not be underestimated. To Lovett, "Scotland's political leadership and civil society have collectively made land reform one of the pillars of Scotland's current national identity".[40]

The Scottish Government has facilitated this through the introduction of legislative mechanisms. When this thesis refers to land law reform or "rights to buy" it refers collectively to the pre-

[37] C. Warren, "Scottish Land Reform Time to Get Lairds A-Leaping" (1999) 20 *ECOS* 1-4.

[38] LPRG, *Identifying the Problems* (Edinburgh: The Stationary Office 1998).

[39] M. Hoffman, "Why Community Ownership? Understanding land reform in Scotland" (2013) 31 *Land Use Policy* 289.

[40] J. Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of the Community Right to Buy" (Cambridge Centre for Property Law Conference, Cambridge, 26 May 2018).

emptive, conditional, and absolute legislative rights to buy. Part 2 of the Land Reform (Scotland) Act 2003 ("LR(S)A 2003") introduced the "community right to buy".[41] This right is pre-emptive in that it is a right to register an interest that only becomes active when the land is offered for sale. Part 3 of the LR(S)A 2003 introduced an absolute right to buy for crofting communities.[42] This right is absolute as, provided the correct procedures are followed, the landowner cannot object to the purchase.[43] The Agricultural Holdings (Scotland) Act 2003 ("AH(S)A 2003") introduced the tenant farmer's right to buy.[44] The Community Empowerment (Scotland) Act 2015 introduced the "right to buy abandoned and neglected land" into Part 3A of the LR(S)A 2003.[45] This introduced a conditional right to buy abandoned and neglected land upon ministerial approval. Part 5 of the Land Reform (Scotland) Act 2016 ("LR(S)A 2016") introduced the community right to buy for "sustainable development".[46] This right is conditional upon ministerial approval and is expected to come into force in 2019. The LR(S)A 2016 introduced the right of agricultural tenants to apply to the Scottish Land Court for an order of sale where the landlord is in breach.[47] These rights to buy will be discussed in detail in part 2 of chapter one.

1.4.2 PROPERTY

Property to the layman is "thing ownership".[48] In relation to the purposes of this thesis, it can be rudimentarily reduced to the *dominium* or ownership of land. Under A1P1, the term "possession" is used and has been given an autonomous meaning by the ECtHR and domestic courts as denoted by a corporeal or incorporeal thing, or the legitimate expectation of acquiring a thing.

What constitutes property has occupied many of the greatest thinkers throughout history without a unitary agreeable definition being found. The first point to note is that while one is often found referring to a "thing" such as a house, car, or toothbrush, when accompanied by possession as one's property, in the proper legal sense the property one is referring to is simply the visible manifestation of invisible rights. Property is therefore not one single unitary thing but a multitude

[41] LR(S)A 2003 Pt 2.

[42] Ibid Pt 3.

[43] *Pairc Crofters v Scottish Ministers* [2012] CSIH 96, 2013 SLT 308.

[44] AH(S)A 2003.

[45] CE(S)A 2015 Pt. 4; LR(S)A 2003 Pt 3A.

[46] LR(S)A 2016 Pt 5.

[47] Ibid s. 100; AH(S)A 2003 Pt 2A.

[48] L. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: OUP 2003) p. 11.

of accompanying and sometimes conflicting rights. To MacCormick, the ownership of private property "involves a devolution of power over the use and enjoyment of things to the discretion of each member of a multitude of persons in ways that constantly vary in the context of markets wherever these exist".[49]

However, property is not defined merely by individual entitlements but instead encompasses certain societal norms and legal obligations that must be respected for all rights to be fully enforceable and to retain existing possession.[50] These rights are not absolute in the sense of being inalienable. In *Jus Feudale*, one of the foundational texts of Scots law, in 1603, Craig wrote that one way in which a feudal estate may be lost is when "the importance of preserving inviolate private rights and contract is outweighed by considerations of public policy".[51]

Going forward, it is essential to reiterate that property in land is not an absolute right but is qualified by the public interest. Property rights in land do not refer to the physical soil but the legal rights that exist between the soil, the individual, and society. Such rights and obligations are the legal, and sometimes even moral, manifestation of recognisable rights that the layman will recognise as thing-ownership but, upon further inspection, is a complex and highly disputed set of power relations and concurrent societal obligations.[52]

1.4.3 PROPERTY RIGHTS AND THE RIGHT TO PROPERTY

With incommensurable debates shadowing our understanding of "rights" and "property", finding a workable definition of the "right to property" is no straightforward task.[53] It is not the purpose of this thesis to dwell on these complex theoretical questions, but a general linguistic framework is required to proceed. The defence of private property has been a feature of philosophical, theological, and legal discourse from antiquity to the present day.[54]

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[49] N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: OUP 2007) p. 152.

[50] G. Alexander, E. Penalver, J. Singer and L Underkuffler, "A Statement of Progressive Property" (2009) 94 *Cornell Law Review* 743, 743.

[51] T. Craig, *The Jus Feudale* (Trans) J. Clyde (Edinburgh: William Hodge & Co 1934) p. 921.

[52] K. Gray, "Property in thin air" (1991) 50 *Cambridge Law Journal* 252.

[53] J. Harris, "Is Property a Human Right?"" in J. McLean (ed) *Property and the Constitution* (Oxford: Hart 1999) p. 64.

[54] P. Garnsey, *Thinking about Property from Antiquity to the Age of Revolution* (Cambridge: CUP 2007).

For example, an agricultural tenancy held by X is a "property right". The right of X to enjoy the peaceful enjoyment of this lease is a "right to property". The "property rights" in this example determine the tenancy, notably the terms for which the holding or different parts thereof are agreed *between* X and the landowner Y. The "right to property" represents the "pre-shaped" rights that will be protected for the duration of the tenancy and after, i.e. X's right to the peaceful enjoyment of the tenancy and Y's right as the owner of the land. The "right to property" is not confined to X and Y but extends to the further societal rights of Z. Z's rights are numerous but include *inter alia* the right of responsible access under Part 1 of the LR(S)A 2003 and in some instances "negative" rights such as the law of nuisance and environmental law which limits the free use of the subjects held by X and Y, deemed necessary to protect Z but also, by way of the doctrine of "reciprocity of advantage", also X and Y. These rights are also applicable to X and Y's rights to the peaceful enjoyment of property and the tenancy. Whether the rights (the right to protect property rights against nuisance, trespass, or another interference) are protected by private law (for X, essentially the contract contained in the tenancy) or human rights law, is difficult to discern.

The "property right" is essentially a private law right. Whether the "right to property" is also a private law right or derives its authority from human rights law, namely A1P1, is also not a straightforward task. Within the context of private law, rights to property can be contracted out of, and surrendered by, other means. In the context of human rights law, the "rights" are in the words of Dworkin, "clubs to defend oneself against the abuses of the state".[55]

Since the coming into effect of the HRA, the "parchment" guarantee is the most visible manifestation of a right to property in relation to contemporary Scots land law reform. However, when and where human rights law will "bite" instead of private law rights to protect X and Y's "right to property" is blurred. Further observations will be made on these issues in chapter five.

Readers of this thesis are to proceed under the linguistic framework that reference to "property rights" primarily denotes the "ownership" rights associated with land. This is not a reference to the land itself as a physical entity but the legal rights that relate to that physical entity. These are not just held by "owners" but tenants and the populace. The "right to property" is the ability to defend the legal relationships that exist between the individual, communities, and the object. It is these rights to property that are protected by A1P1. As Stewart J of the US Supreme Court

[55] R. Dworkin, *Taking Rights Seriously* (London: Bloomsbury 2013).

observed "property does not have rights. People have rights".[56]

1.4.4 HUMAN RIGHTS AND PROPERTY

A1P1 protects against interferences with the "peaceful enjoyment of possessions", or in other words, the right to property.[57] For example, the text of A1P1 includes the use of "possessions" ("*biens/propriété"*) and "use of property" ("*usage des biens"*), and the *travaux préparatoires* shows that the drafters continually spoke of the "right of property" or "right to property" to describe the subject-matter.[58]

The ECtHR has developed a discernable set of tests when considering A1P1 applications that have since been incorporated into domestic law. The ECtHR has taken an "autonomous" approach to "possession" to denote an object of economic value.[59] Domestic courts have therefore followed this broad approach, disassociating possession from its ordinary Scots law meaning.[60] The human right to property is a qualified right and can be deprived by States under certain circumstances. The ECtHR has determined that interference must meet the test of legal certainty, be justified in the general or public interest, and have a reasonable degree of proportionality between the means selected and the ends sought to be achieved. This is thought to be necessary to ensure that a fair balance between individual and collective interests has been maintained.[61]

Scottish land reform is reigniting the enduring question of what constitutes a human right. The UK is a dualist state and, as such, even international treaties do not form part of Scots law although they can be taken into account as an aid to the interpretation of statutes and in the development of the common law.[62] What the HRA has done is to create domestic rights expressed in the same terms as those contained in the ECHR and its Protocols. However, they are domestic rights, not international rights.[63] The domestic rights created by the HRA are interpreted by reference to the

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[56] *Lynch v Household Finance Corp* (1972) 405 US 538, 542 (United States).

[57] Goymour, "Proprietary Clams and Human Rights – A "Reservoir of Entitlement"?" (n 26) 709.

[58] *Marckx v Belgium* (1979) 2 EHRR 350 [63].

[59] *Broniowski v Poland* (2005) 40 EHRR 21.

[60] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [114].

[61] *James v United Kingdom* (1986) 8 EHRR 123.

[62] J. Murdoch and R. Reed, *Human Rights Law in Scotland* (London: Bloomsbury 2017) p. 1.

[63] *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807 [65].

corresponding rights under the ECHR.[64]

1.4.5 MICRO AND MACRO GRANULARITY

When this thesis refers to "granularity", this denotes the scale or level of detail that the court considers in its decision-making capacity. This can be split between macro-granularity – when the court takes a broad approach to determining compatibility by considering the underlying purpose and wording of the Act, – and micro-granularity – when the court considers the facts of the case before it in greater detail and considers the question of individual balance and individual rights. References to "micro" or "macro" legal analysis are relatively common in comparative legal research.[65] The importance of the distinction between macro and micro for this thesis is that it emphasises how proportionality operates at two levels of intensity. This is apparent in the approach of Lord Neuberger in *Manchester City Council v Pinnock*.[66]

The level of granularity undertaken in A1P1 cases is comparable to the Supreme Court decisions concerning Article 8 of the ECHR. For example, the Supreme Court in *Manchester City Council v Pinnock* and *London Borough of Hounslow v Powell* observed that, in general, the measures in question are proportionate (macro-granularity), but that, in certain exceptional cases, they may not be proportionate (micro-granularity).[67] As a result, the Supreme Court appears to consider two separate, but related questions. First, it is asked whether the legislation is compatible with Convention rights. However, the weight given to democratic institutions means that the reasoning undertaken at this stage is imbued with judicial deference. The second level of analysis requires the court to individualise the facts before it. This requires the court to take a harder look, although judicial deference remains an important consideration and is limited by the interpretative methodologies undertaken by the Supreme Court being not entirely uniformed.[68]

1.5 RELEVANT NON-CONVENTION RIGHTS

While this thesis is primarily concerned with A1P1, it cannot give a comprehensive account of A1P1 if it is considered in isolation. Over the three years in which this thesis has been researched

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[64] *R (S and Marper) v Chief Constable of West Yorkshire* [2014] UKHL 39, [2004] 1 WLR 2196 [66].

[65] See M. Siems, *Comparative Law* (Cambridge: CUP, 2014) p. 14.

[66] *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104.

[67] Ibid; *London Borough of Hounslow* v *Powell* [2011] UKSC 8, [2011] 2 AC 186.

[68] *Sims v Dacorum Borough Council* [2014] UKSC 63, [2015] AC 1136.

and written, it has become increasingly apparent that to fully appreciate the role A1P1 serves, it must be placed within the broadening of the human rights discourse in Scotland. In a discussion paper published by the Scottish Land Commission in May 2018, Shields argued that:

> Recognition that the ECHR right to property does not exist in isolation but exists in inter-relationship with all human rights, including economic, social and cultural rights, created a sea change in engagement with the human rights potential of the [LR(S)A 2016]. Rather than thwart the community ownership agenda through right to property claims, it became clear that human rights could legitimise and give structure to long-awaited changes in land ownership.[69]

It is therefore clear that the inclusion of the ICESCR was a considered response to a perceived overemphasis on individual rights, which are the focus of this thesis. Chapter two of this thesis will therefore ask what rights and whose rights are engaged by contemporary Scots rights to buy, and in particular what effect reference to the several "relevant non-convention rights" Acts of the Scottish Parliament will have on the ability of individuals to realise their A1P1 rights in Scots law.

1.6 COMPARATIVE PERSPECTIVES

This thesis will refer to several other jurisdictions around the world to add examples and context to Scots law. Caution is necessary when taking a comparative lens. As Montesquieu once noted, it is "very unlikely that the laws of one nation can suit another".[70] Further, the Scottish legal system is distinct from that of England and Wales. Land reform is inherently political and often has its foundations in questions over entitlement and the just distribution of rights to property in land. It is important to recognise the politics of reform, especially where political rhetoric does not reflect the practical realities and consequences of reform.[71]

1.7 CASE LAW

The case law on A1P1 and rights to buy is sparse; therefore, it is important to set out the facts in the three main decisions on A1P1 and land reform in Scotland.

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[69] Shields (n 4) p. 2.

[70] C. Montesquieu, *The Spirit of the Laws Bk 3.* (Cambridge: CUP 1989) p. 8.

[71] J. Howell, *The Dangers of Reform in The Reform of Property Law* (Aldershot: Ashgate 1997) p. 59.

1.7.1 *Pairc Crofters Ltd v Scottish Ministers* [2012] CSIH 96, 2013 SLT 308

The Pairc Estate (*A' Phàirc*) is located on the island of Lewis and extends over 26,800 acres. In March 2011, the Scottish Ministers granted consent to the application of the Pairc Trust which represented the crofting community body to exercise a right to buy croft land on the Pairc Estate.[72] The purchase was challenged on the grounds that the crofting community right to buy was incompatible with A1P1 and Article 6.[73] In essence, the appellants contend that sustainability and the public interest must be deemed non-justiciable, and thus, if Parliament had decided otherwise, it would have set this out in clear and specific language.[74] The appellants questioned the criteria for consent to a purchase by Ministers – in particular, "sustainable development",[75] and the deprivation of property being in the public interest.[76] The Inner House unanimously dismissed the appeal, with Lord Gil observing that "the relevant legislative provisions and the principles of administrative law, considered as a whole, offer a level of protection equal to or surpassing that which, on any view, is required by the Convention".[77]

1.7.2 *Salvesen v Riddell* [2013] UKSC 22, 2013 SC (UKSC) 236

Background

In Scotland, agricultural tenants enjoyed near indefinite security of tenure under the Agricultural Holdings (Scotland) Act 1991 ("1991 Act").[78] A notice to quit could only be served in limited circumstances and only when the Land Court granted consent.[79] Further, tenants had a right to bequeath the tenancy to a broad category of related persons for an indefinite number of generations.[80]

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[72] LR(S)A 2003 s. 73.

[73] *Pairc Crofters* (n 43).

[74] Ibid [100].

[75] LR(S)A 2003 s. 74(1)(j); LR(S)A 2003 s. 74 and 74(1A).

[76] LR(S)A 2003 s. 74(1)(n).

[77] *Pairc Crofters* (n 43) [68].

[78] Agricultural Holdings (Scotland) Act 1948; Agricultural Holdings (Scotland) Act 1991; *MacFarlane v Falfield Investments Ltd* 1998 SC 14 (IH).

[79] Agricultural Holdings (Scotland) Act 1991 Pt III.

[80] Ibid s. 11.

To avoid this far-reaching and perpetual security of tenure, a practice emerged of granting agricultural tenancies to partnerships governed by the Limited Partnerships Act 1907. The landowner, or his nominee, became the limited partner and the tenants became general partners. Landlords who sought vacant possession could dissolve the partnership, bringing the agricultural tenancy to an end.[81] This practice, while criticised, became widespread.[82]

It became recognised that a new statutory structure for leasing of agricultural land was required to stop this practice and give general partners security of tenure.[83] In April 2002, the Scottish Executive published a Consultation Paper incorporating the Draft Bill. Section 42, which would later become section 70 of the 2003 Act, stated that it was to apply only to partnerships entered into *after* the commencement of the act.[84] As such, the Bill did not affect existing limited partnership tenancies.

Fearing the loss of control caused by the creation of near indefinite security of tenure, many landowners responded by serving notices to quit on tenants. This spate of notices to quit resulted in strong criticism from Holyrood.[85] The Scottish Ministers responded by adding Amendment 169 an "anti-forestalling" provision to the effect that general partners who had received notice of dissolution of their limited partnership on or after 4 February 2003 could apply to the Land Court for an order allowing them to continue as 1991 Act tenants.[86] It followed from this proposal that if the Land Court were to make such an order, the general partner, *qua* tenant, would be able to take advantage of the right to buy provisions that the Bill proposed.[87]

The Scottish Ministers proposed another amendment at Stage 3 of the Bill. Amendment 111 provided *inter alia* that where notice of dissolution was served on or after 16 September 2002 but before the relevant date, the tenancy would continue in effect with the general partner as tenant if the general partner gave notice to that effect. As Lord Gill noted in Salvesen:

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[81] ibid s. 6(3).

[82] HC Deb, 21 April 1983, Vol. 41, Cols. 454-459.

[83] Scottish Executive, *Agricultural Holdings: Proposals for Legislation* (Edinburgh: Scottish Executive 2000) para 2.9.

[84] Scottish Executive, Draft Agricultural Holdings (Scotland) Bill (April 2002)

[85] SP, *OP, RDC*, 4 February 2003.

[86] AH(S)A 1991 s. 21-24.

[87] *Salveson* v *Riddell* [2012] CSIH 26, 2013 SC 69 [23].

> Amendment 111 was potentially calamitous for some landlords. It made the landlord's position even weaker than it had been after amendment 169. Under amendment 169 the general partner could become tenant only if he applied to the Land Court and established the specified grounds: but under amendment 111 the general partner, on giving notice, became tenant unless the landlord applied to the Land Court and established the specified conditions. But worst of all, from the landlord's point of view, amendment 111 was retrospective. It caught notices of dissolution that had been served in the period since the Bill was introduced. It therefore caught notices served when the assurance in the White Paper that existing limited partnership leases would not be affected by the legislation had not been withdrawn or qualified. The new proposal had particular significance for landlords because of the right to buy provisions.[88]

The result of these amendments was that the 2003 Act that received Royal Assent on 22 April 2003, was a "very different animal to the Bill which Ross Finnie introduced on 16 September 2002".[89] As the Scottish Executive had undertaken what Fox described this as a "knee-jerk reaction", to nullify the effect of dissolution notices served between the "relevant period" of 16 September to 1 July 2003.[90]

As enacted, section 72 allowed general partners of existing limited partnerships to obtain secure 1991 Act tenancies on the dissolution of the partnership. This significantly reduced the autonomy of the landowners. Section 72(6) of the 2003 Act provided that if a landlord sought to bring an agricultural tenancy to an end by dissolving a limited partnership on or after 16 September 2002, then the tenancy continued inexistence with the non-landlord partner, known as the general partner, as tenant in his or her own right (if the general partner gave notice that this is intended to happen).[91]

Section 73 of the 2003 Act was a counterpart to section 72(6).[92] It entitled the landlord to bring the tenancy to an end by service of a notice to quit at a time of the landlord's own choosing.[93]

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[88] Ibid at [23].

[89] A. Fox, 'How the Leopard Changed Its Spots' (2003) 48(5) *Journal of the Law Society of Scotland* 58, 58.

[90] Ibid.

[91] AH(S)A 2003 (as originally passed) s. 72.

[92] ibid s. 72(6) and 73.

[93] ibid.

However, section 72(10) qualified this position by stipulating that section 73 did not apply to landlords who served the dissolution notice between 16th September 2002 and 30th June 2003.[94] The paradox created by section 72 was summarised by Lord Gill in *Salvesen*:

> In this way the Parliament conferred on the general partner a form of tenancy the creation of which section 1 of the 2003 Act was designed to restrict and a form of tenancy that had caused the problems that the 2003 Act sought to cure.[95]

Thus section 72 had an adverse, and somewhat incongruous effect on the rights of landlords who gave notice to dissolve a limited partnership tenancy within a relatively limited period, running from the introduction of the Bill to 30 June 2003. Other landowners who had let farms to limited partnerships but did not give notice during that period were not affected.[96]

1.7.2.2 The Case of Salvesen v Riddell

Salvesen owned a farm in East Lothian. Salvesen, like many landowners served a notice of dissolution on 3 February 2003 on a limited partnership entered in 1992 that ran to 28 November 2008.[97] Riddell gave notice to Salvesen under the Agricultural Holdings (Scotland) Act 2003 that they intended to become joint tenants of the subjects in their right.[98] The late amendments to the 2003 Act required Salvesen to obtain and order from the Land Court. However, this was dismissed, and Salvesen was unable to obtain vacant possession.[99]

Salvesen appealed to the Inner House on the grounds that section 72 of the 2003 Act, as read by the Land Court, was incompatible with A1P1. To Lord Gill the difference in treatment caused by the late amendments to the bill were "arbitrary", "retaliatory", and "lacked intellectual justification".[100] Lord Gill was unable to find any convincing justification for the difference in

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[94] ibid s. 72(10).

[95] *Salvesen* (IH) (n 87) at [82].

[96] *McMaster* (IH) (n 5) (n 1) at [7].

[97] *Salvesen* (IH) (n 87) at [3].

[98] *Salvesen* (UKSC) (n 11) at [42].

[99] *Salvesen v Riddell* 2010 SCLR 107 (Land Ct).

[100] *Salvesen* (IH) (n 87) at [80], [90] and [91]

treatment of landlords.[101] As such, it was held that section 72 of the 2003 Act was incompatible with A1P1.[102]

The Lord Advocate appealed to the Supreme Court on the compatibility issue. The Supreme Court held that the effect of section 72(10) was to deny the benefit of section 73 to all cases where the tenancy was purportedly terminated between 16 September 2002 and 30 June 2003, but which continue to have effect by virtue of section 72(6). The landlords who served dissolution notices during that period were in a worse position than those who served notices from 1 July 2003. The provision was disproportionate and discriminatory in a respect that affects the landlords' Convention rights.[103]

The Supreme Court's order in *Salvesen*, dated 24 April 2013, suspended the effect of that declaration for 12 months, or such shorter period as might be required for the defect to be corrected by remedial legislation. The Scottish Ministers responded by passing the Remedial Order.[104] This came into force on 3 April 2014 and removed the incompatibility arising from the operation of section 72(10) by repealing provisions of section 72 and inserting a new section 72A.[105] The result was that the future petitioners in *McMaster* had their secure 1991 Act tenancies extinguished. As a result, all of the petitioners' respective landlords in *McMaster* issued notices terminating the tenancies.

1.7.3 *McMaster v Scottish Ministers* [2017] CSOH 46, 2017 SLT 586

In *McMaster*, six sets of petitioners totalling 27 persons including the former general partner or joint general partners of a limited partnership which had been the tenant of particular farming land, family members of the general partners and one or more partnerships or limited partnerships, averred that they had suffered loss, injury and damage because of the passing of section 72(10) of the AH(S)A 1991 and the making of the Remedial Order.[106] The applicants believed that they could acquire secure AH(S)A 1991 tenancies on the passing of the AH(S)A 2003. A notice of dissolution had been served on each partnership between 16 September 2002 and 30 June 2003.[107]

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[101] Ibid at [97].

[102] Ibid at [98].

[103] *Salvesen* (UKSC) (n 11) [42].

[104] Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 (SSI 2014/98).

[105] Ibid.

[106] *McMaster* (IH) (n 5) [1], [25], and [26].

[107] AH(S)A 2003 s. 72(6).

The result of the Inner House and the Supreme Court in *Salvesen* finding sections of the AH(S)A 2003 as *ultra vires* and the resulting remedial order has extinguished these perceived rights of obtaining a secure tenancy.

At first instance, Lord Clark held that compensation was only available where the petitioners had incurred costs in consequences of "reasonable reliance" on the defective legislation.[108] But any claim was subject to the counterbalancing effect of setting off the value of benefits obtained by the qualifying general partners arising from the extended period of tenancy that they had enjoyed (from 1 July 2003 until the Remedial Order came into force on 3 April 2014).[109] Crucially, The petitioners were unable to claim for the loss of the secure 1991 Act tenancies and the loss of the good-will tied up in the family farming business. As Shields noted in response: "Having established that compensation might be due to the petitioners, the scope for compensation was then minimised so as to be rendered almost worthless".[110]

The petitioners appealed to the Inner House. On 12 June 2018, The Inner House of the Court of Session handed down a unanimous opinion in *McMaster v Scottish Ministers*.[111] Lord Drummond Young (with whom The Lord President, Lord Carloway and Lord Menzies agreed) dismissed the appeal.[112]

1.8 SUMMARY

The purpose of this thesis is to determine the role and influence A1P1 has had, and will continue to have, on contemporary Scots rights to buy. In doing so, it will not consider A1P1 in isolation, but place it within the broader human rights discourse. It will then be shown how the conclusions drawn offer significant guidance on the effect of A1P1 in domestic law and the limits of progressive rights to property in practice.

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[108] *McMaster v Scottish Ministers* [2017] CSOH 46, 2017 SLT 586 at [191].

[109] *McMaster* (IH) (n 5) at [13].

[110] K. Shields, 'McMaster v Scottish Ministers – the tenant farmers case' (2007) 2 *Juridical Review* 113, 118.

[111] *McMaster* (IH) (n 5).

[112] *McMaster* (IH) (n 5) at [61]; D. Maxwell, "Mistaken Rights to Property, Agricultural Tenancies, And Good Governance: McMaster v Scottish Ministers" (2018) 10 *Journal of Planning and Environment Law* 1076.

2 CHAPTER ONE
THE SCOTTISH LAND QUESTION AND CONTEMPORARY LEGAL REFORMS

2.1 INTRODUCTION

This thesis challenges existing conceptions of A1P1. It does this through the lens of contemporary distributive land reform in Scotland. Since devolution, the Scottish Parliament has undertaken arguably the most far-reaching legislative reform of land law in the Western world. Part 1 of this chapter considers the driving forces behind contemporary reforms. It argues that several, often intertwined factors have inspired reform. Land reform is inspired by the complex history of Scotland and the contemporary conceptions of landed power and the highland clearances. This is emboldened by a feeling of distance between those who own the land and those who live there, facilitated by absentee ownership, the use of tax avoidance schemes, and questions over the transparency of ownership. The contemporary political rhetoric tends to focus on the high concentration of ownership that has existed for centuries and theories of distributive justice. Part 1 should not be considered a comprehensive critique of the Scottish land question or the history of Scottish land law; instead, it should be read as a background to the legislative reforms that will later be outlined in part 2 and considered through the lens of property rights throughout this thesis.

Part 2 of this chapter will set out contemporary Scots land law reforms. While it is important not to conflate land reform in its totality with community, crofting and agricultural rights to buy, the focus of this thesis will be on the six contemporary rights to buy and their ability to conditionally and pre-emptively expropriate land and ancillary rights.

2.2 CHAPTER ONE: PART 1 THE SCOTTISH LAND QUESTION

Commentators today often speak of the "Scottish land question", and as such it has become a term synonymous with contemporary reforms. Land reform was brought onto the political agenda in the late seventeenth and early nineteenth centuries.[113] It would be a gross understatement to describe the Scottish land question as simply controversial. Historically complex and politically contentious, not to mention legally complicated, the confusion that greets this topic is exacerbated

[113] M. Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish land question" (2016) *Juridical Review* 291-313.

by the available literature often being cumbersome and inaccessible. To comprehend contemporary debates, the historical context of modern reforms must be understood.

For most of the twentieth century, despite sporadic minor resurgences, the debate shifted from the political mainstream to be the preserve of the legal profession, Scotland Office civil servants, and a small group of activists. This all changed with the establishment of the Scottish Executive in 1999, which transformed the context in which Scottish property law could be debated and addressed.[114] The result is that the last twenty years have seen land reform thrust to the legislative and policy forefront. Despite the assertions of Lord Sewel, the chairman of the Land Reform Policy Group ("LRPG"), in 1999 that "the Government's approach to land reform is to focus on the future, not the past",[115] it would be naïve to think that recent reforms were not inspired, in part, by factors that have been described as Scotland's "historical hangover".[116]

It is not possible to do justice to the complicated past and enduring debates that surround the history of land ownership in Scotland. Readers are advised to turn to Tom Devine's *The Scottish Clearances: A History of the Dispossessed*, published in 2018, for as near a comprehensive account as is possible within the confines of a text that is digestible.[117]

2.2.1 A DIVIDED NATION

The eminent Scottish writer Robert Louis Stevenson wrote:

> Scotland is indefinable; it has no unity except on the map. Two languages, many dialects, innumerable forms of piety, and countless local patriotisms and prejudices, part us among ourselves more widely than the extreme east and west of that great continent of America.[118]

What Stevenson helps illustrate is that, traditionally, Scotland has been divided between the Highlands and Islands and the lowlands and East coast.[119] This division is important for this thesis. In the lowlands, Norman feudal law came to influence the system of land tenure as ancient military

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[114] SA 1998 named the body the "Scottish Executive". In 2007 this was rebranded as the "Scottish Government". The name was officially changed to the Scottish Government by s. 12(1) of the Scotland Act 2012.

[115] LRRG, *Recommendations for Action* (Edinburgh: The Stationary Office 1999).

[116] M. Lloyd and M. Dawson, "The Land Policy Group in Scotland" (2000) 15 *Local Economy* 214, 221.

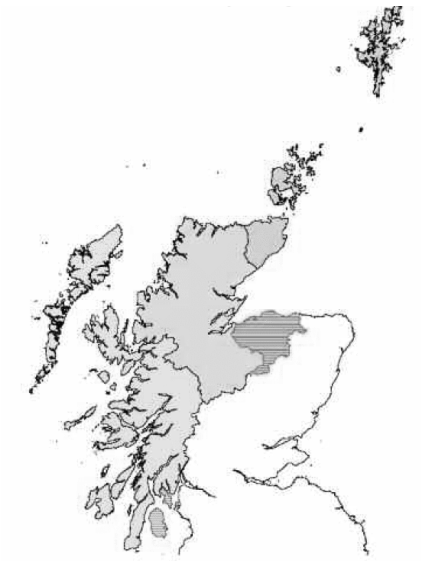
[117] T. M. Devine, *The Scottish Clearances: A History of the Dispossessed* (London: Penguin Random House, 2018).

[118] R. Stevenson, *The Silverado Squatters* (Carlisle MA: Applewood Books 2007) p. 337.

[119] See J. Dawson, "The Gaidhealtachd and the emergence of the Scottish Highlands" in B. Bradshaw and P. Roberts (eds) *British Identity and British Consciousness* (Cambridge: CUP 1998) pp. 259-300.

tenures were converted to the paying of rents. In the Highlands, the system of land tenure retained its ancient origins significantly longer than in the rest of the UK.[120] As such, it is often contended that the Scottish land question is predominantly concerned with the Highlands and Islands.[121] This is most apparent in relation to crofting law which was historically confined to the "crofting counties", shown as the shaded counties in figure 1. As the Land Reform Review Group ("LRRG") noted, "the fact that the Crofters Act in 1886 only introduced crofting tenure in the seven most northerly and westerly counties in Scotland, has tended to encourage a view that crofters and crofting have always been something distinct to those areas".[122]

Figure 1



Source: Land Reform Review Group, "The Land of Scotland and the Common Good" (Edinburgh: Scottish Government, 2014) Fig. 30

The land reform debate is often Highland centric, and this is important to highlight, but it does cover the entirety of Scotland.[123] The legislative reforms do not just affect the ownership of land in "rural" communities. While the original LR(S)A 2003 was only applicable to communities with

[120] J. Prebble, *The Highland Clearances* (London: Penguin 1963) p. 13.

[121] M. P. Dziennik, "Liberty, Property and the Post-Culloden Acts of Parliament in the *Gàidhealtachd*" in G. Pentland and M. T. Davis (eds) *Liberty, property and popular politics: England and Scotland, 1688-1815* (Edinburgh: Edinburgh University Press 2016) pp. 52-70.

[122] LRRG, *The Land of Scotland and the Common Good* (Edinburgh: The Stationary Office 2014).

[123] A. McIntosh and A. Wightman "Reclaiming the Scottish Highlands: Clearance conflict and crofting" (1994) 24 *The Ecologist* 64.

a population under 10,000, this has since been removed.[124] For example, a high-profile application has been made in regard to a disused church in Edinburgh.[125] The point to take into the rest of this thesis is that while the land reform debate is arguably at its most heated for historical and socio-economic reasons in the Highlands and Islands, the debate encompasses the whole of Scotland. Despite this, rights to buy and community ownership remain primarily confined to the Highlands and Islands. The Office of National Statistics reported in December 2017 that 548,128 out of a total of 562,299 acres of land in community ownership is in the Highlands and Islands, with only 9 acres in the Lothians and 11 in Glasgow.[126]

2.2.2 HISTORICAL GRIEVANCES

When it comes to the Scottish land question, in the words of the influential play *The Cheviot the Stag and the Black, Black Oil*, "it begins, I suppose, with 1746 – Culloden and all that. The Highlands were in a bit of a mess".[127] The defeat at Culloden resulted in legal reform as the British government attempted to bring the Highlands under control.[128] The age of enlightenment was accompanied by the increase of capitalism and a paternalistic theory of improvement.[129] This shift in land-use resulted in considerable population reductions; forced emigration to North America or Australasia; and re-settlement on Scotland's coastal fringes. This reverberated around the world as many of the dispossessed went on to expropriate land from native peoples around the British empire. Those pushed to the coast make up a considerable proportion of the people we, today, call crofters.[130]

It is important to remember the dispossession and the enclosures were not confined to the Highlands. As Devine asserts, this "was indeed the Scottish clearances".[131] However, he notes that "[t]he dispossession of people in the Highlands has always had a high historical profile. In the Lowlands it is low to the point of virtual non-existence".[132] The Clearances were not a homogenous

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[124] LR(S)A 2003 s. 38 (as enacted).

[125] See I. Swanson, "Community bid for landmark Edinburgh church" *The Scotsman* (Edinburgh: 13 September 2017).

[126] Scottish Government, "Estate of Community Owned Land in Scotland 2017 Experimental Statistics" (Edinburgh, Office of National Statistics, 8 December 2017) p. 17.

[127] J. McGrath, *The Cheviot, the Stag and the Black, Black Oil* (London: Bloomsbury 1981).

[128] M. Dziennik, "Liberty, Property and the Post-Culloden Acts of Parliament in the *Gàidhealtachd*" in Pentland G and Davis M (eds), *Liberty, property and popular politics: England and Scotland, 1688-1815* (Edinburgh: Edinburgh University Press 2016) p. 52.

[129] E. Richards, *The Highland Clearances* (Edinburgh: Birlinn 2008).

[130] D. Craig, *On the Crofters' Trail* (London: Random House 1997) p. 3.

[131] Devine (n 117) p. 354.

[132] Ibid p. 187.

serious of events nor were the reasons for change uniform.[133] A widespread perception of the clearances is illustrated in the play *The Cheviot the Stag and the Black, Black Oil*, by characters playing the infamous factor of the Sutherland Estate, Patrick Sellar, and his assistant James Loch:

> So if you'd abandon your old misery –
> I will teach you the secrets of high industry:
>
> Your barbarous customs, though they may be old
> To civilised people hold horrors untold –
> What value a culture that cannot be sold?
> The price of a culture is counted in gold.
>
> I've money to double the rent that you pay
> The factor is willing to give me my way
> So off you go quietly – like sheep as they say –
> I'll arrange for the boats to collect you today.[134]

The importance of the legacy and popular perception of the Clearances should not be underestimated. As the Scottish Landowners Federation concluded: "the passionate memory of the Highland clearances is likely to be a stumbling block to any effective advocacy of the landowner's case".[135] It is difficult to overstate how sensitive the clearances remain. Speaking in Parliament in 1965, Willie Ross MP stated to the House that "[f]or 200 years, the Highlander has been the man on Scotland's conscience... No part of Scotland has been given a shabbier deal by history". Ross felt it necessary to highlight that "[i]f there is bitterness in my voice, I can assure the House that there is bitterness in Scotland, too, when we recollect the history of these areas... We have [in the Scottish Highlands] nine million acres, where 275,000 people live, and we are short of land!"[136]

The accuracy of popular narrative is subject to challenge. In *The Scottish Clearances: A History of the Dispossessed*, Devine concludes that past quasi-historians have successfully embedded a Greek

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[133] E. Richard, *Patrick Sellar and the Highland Clearances* (Edinburgh: Edinburgh University Press 1999) p. 34.

[134] McGrath (n 127).

[135] J. Glass et al, *Lairds: Scottish Perspectives on Upland Management* (Edinburgh: Edinburgh University Press 2013) p. 69.

[136] HC Deb 16 March 1965, vol. 708, col. 1075.

tragedy in the Highlands. This portrayal of a struggle between a noble warrior people suffering brutal repression at the hands of the British state, abandoned by their tribal leaders due to their lust for money and power, remains a compelling (yet not entirely historically inaccurate) part of the Scottish narrative.[137] While compelling as a story, Devine sets out the limitations of natural endowment in the Highlands in meticulous detail: the unsustainable increase in population; the destruction of infant manufacturing; bankruptcy; the overwhelming power of market capitalism; and the absence of any viable alternative to pastoral husbandry.[138]

2.2.3 AN ERA OF INSTABILITY

Agricultural decline and an influx of new industrial wealth from the rest of the UK and its burgeoning empire in the middle of the 19th century resulted in the "Balmoralisation" of the Highlands. This is named after the romanticised castle bought by Queen Victoria in 1852. Large tracts of the Highlands were bought for the sole purpose of recreation as a sentimentalised image, exaggerated by the likes of Sir Walter Scott, the royal family, and the British press's fascination with the noble actions of Scottish regiments overseas. By the middle decades of the nineteenth century over two thirds of Highland estates had changed hands.[139] With this tweed-, shortbread-, and tartan-covered image of Scotland that survives to this day came an influx of new landowners. Large parts of particularly the Highlands were increasingly being used exclusively for the leisure pursuits of the wealthy. As a result, anti-landlord sentiment grew as did the feeling that the landowners were outsiders, often absentees, and worst of all "English!"[140]

The system of land ownership in Scotland began to be questioned and challenged. In 1885 George observed in *The Reduction to Inequality*:

> Test the institution of private property in land by its fruits in any country where it exists. Take Scotland. What, there, are its results? That wild beasts have supplanted human beings; that glens which once sent forth their thousand fighting men are now tenanted by a couple of gamekeepers; that there is destitution and degradation that would shame savages; that little children are stunted and starved for want of proper nourishment; that women are

[137] Devine (n 117) p. 360.

[138] Ibid pp. 360-361.

[139] Ibid p. 132.

[140] McIntosh and Wightman (n 123) 64-70.

> compelled to do the work of animals; that young girls who ought to be fitting themselves for wifehood and motherhood are held to monotonous toil in factories.[141]

With unrest growing, the popular consciousness was grabbed by stories of famine and unrest in the popular British press.[142] The government responded by setting up a Royal Commission into the conditions of crofters and cottars in the Highlands and Islands in 1883. This would become known as the Napier Commission. The Napier Commission resulted in the passing of the Crofters' Holdings (Scotland) Act 1886 which set up a body called "the Crofters Commission", whose prime duty was indeed to fix fair rents for crofts. This was replaced by the Scottish Land Court with effect from 1 April 1912, when the Small Landholders (Scotland) Act 1911 came into force.[143]

2.2.4 THE TWENTIETH CENTURY

The twentieth century saw an increase in absentee and foreign ownership. Absentee landlords and land owned by anonymous trusts or – as the recent Panama papers revealed – companies registered in tax havens have helped perpetuate a feeling that much of rural Scotland is owned by a distinct, often portrayed as alien, class of landowners.[144] This desire to publicise ownership is observable in the recent debates over land registration and transparency in the Land Registration etc. (Scotland) Act 2012.[145] The grievance of absentee owners and their perceived disinterest in local communities is expressed in a song in *The Cheviot the Stag and the Black, Black Oil*, where two absentee landlords sing:

> We are the men
> Who own your glen
> Though you won't see us there –
> In Edinburgh clubs
> And Guildford pubs
> We insist how much we care:
> Your interests

[141] G. George and G. Campbell, *The peer and the prophet"* (London: William Reeves 1885) p. 139.

[142] Devine (n 117).

[143] Small Landholders (Scotland) Act 1911 s. 28.

[144] P. Hutcheon, "Revealed: Over 60,000 acres of land in Scotland owned by Panama Companies" *The Herald* (Glasgow: 10 April 2016).

[145] Land Registration etc (Scotland) Act 2012.

Are ours, my friends,
From Golspie to the Minch –
But if you want your land
We'll take a stand
We will not budge one inch…[146]

Absentee owners are more diverse than simply those who frequent private members clubs or enjoy £8 pints in Surrey. As Cramb noted in 2000, "there has been an Arab period, there has been a Dutch period, there is an on-going Danish period... there was a very strong Hong Kong period... and a rock group period".[147] The important point is that land in Scotland has in many instances become subject to broader forces of capitalism and has become yet another commodity to be traded.[148] This has fuelled the rhetoric of radical reform and a feeling that the Scottish people have been disinherited from their own country.[149]

What this section has sought to highlight is the long and complex history of land law and land ownership in Scotland, particularly the Highlands. Scottish history continues to have an impact on modern land law. The historical accuracy of many of the grievances is subject to dispute. This is, however, beyond the ambit of this thesis.

2.2.5 THE CONCENTRATION OF LAND IN SCOTLAND

Proponents of land reform argue that the inequalities of the current system are at the heart of wider social and economic injustices.[150] LRPG argued in 1998 that the current distribution of land in Scotland inhibited local enterprise, caused depopulation and in some instances resulted in environmental degradation.[151] To the LRPG, "[a]ll too often…the interests of the majority have been damaged by the interests of the few".[152] It is often said that Scotland has the most

[146] McGrath (n 127).

[147] A. Cramb, *Who Owns Scotland Now?* (Edinburgh: Mainstream 2000).

[148] Ibid.

[149] I. Evans and J. Hendry (eds), *The Scottish Socialist Society: The Land for the People* (Edinburgh: Darrien 1985) p. 4.

[150] E. Cameron, "Unfinished Business: The Land Question and the Scottish Parliament" (2001) 15 *Contemporary British History*, 83, 84.

[151] LRPG, *Identifying the Problems* (n 38) p. 3.

[152] Ibid p. 23.

concentrated land ownership patterns in the Western world.[153] Warren concluded that "a minuscule 0.025% of the population owns 67% of the privately owned rural land. Thirty owners have more than 25,000 hectares each".[154] This association with the high concentration of landownership and a lack of rural development "has been a source of persistent calls for land reform".[155]

Figure 2

Percentage of Private Rural Land	Number of Land Owners in 2012
10%	**16**
20%	**49**
30%	**110**
40%	**221**
50%	**432**
60%	**963**

Source: Land Reform Review Group, "The Land of Scotland and the Common Good" (Edinburgh: Scottish Government, 2014) Fig. 25.

It must be remembered that these statistics are slightly misleading, particularly when considering Scotland and not simply the Highlands and Islands. Some of the largest estates cover marginal moorland and areas with some of the poorest quality soil in Europe. This is illustrated by a report published by the Hutton Institute which shows that 51% of Scotland's land is classified as Class 6 to 7 meaning that the land has severe limitations and is either steep, very poorly drained, and has acidic or shallow soils.[156] Despite this, the high concentration of ownership is significant and remains a driving force behind calls for greater land reform and distributive justice.[157] The political rhetoric is the deeply embedded conviction that those who work the land should own the land. The 1954 Royal Commission on Crofting Conditions observed that:

> They have the feeling that the croft, its land, its house are their own. They have gathered its stones and reared its buildings and occupied it as their own all their days.

[153] Scottish Affairs Committee Briefing Paper, "Towards a comprehensive land reform agenda for Scotland" (Edinburgh: The Stationary Office 2013) para 2.1.

[154] C. Warren, *Managing Scotland's Environment* (Edinburgh: Edinburgh University Press 2009) pp. 48-49.

[155] Hoffmann (n 39) 291.

[156] K. Matthews (ed), *Land Capability for Agriculture in Scotland* (Aberdeen: The Hutton Institute 2013).

[157] Wightman, *Land and Power* (n 36) p. 57.

> They have received it from their ancestors who won if from the wilderness and they cherish the hope they will transmit it to the generations to come.
>
> Whatever the legal theory they feel it to be their own.[158]

This sentiment is strikingly similar to Steinbeck's *The Grapes of Wrath*:

> Sure, cried the tenant men, but it's our land. We measured it and broke it up. We were born on it, and we got killed on it, died on it. Even if it's no good, it's still ours. That's what makes it ours-being born on it, working it, dying on it.[159]

2.2.6 TAXATION, SUBSIDIES AND TRUSTS

The prevalence of tax avoidance schemes, the use of offshore and onshore trusts, and the large number of available subsidies have been subject to considerable criticism. Leaked documents from the Panamanian law firm Mossack Fonseca showed that companies registered in Panama owned over 60,000 acres of Scotland.[160] The combination of large pay-outs, secretive ownership, and the use of tax avoidance mechanisms is fuelling calls for reform and anti-landlord sentiment.

Many landowners benefit from large transfers of public money in the form of subsidies. While the common agricultural policy ("CAP"), forestry and environmental subsidies make large pay-outs, it is the wind farm "boom" in Scotland that has drawn the greatest criticism from commentators. The Conservative MEP Struan Stevenson concluded that Scotland's wealthiest landowners were on course to earn over £1 billion in rental fees from wind companies.[161] While landowners are adept at maximising public money, a briefing submitted to the Scottish Affairs Committee ("SAC") noted that they are "equally skilled at minimising the flow of cash in the other direction – helped greatly in this regard by successive Governments' toleration of a series of arrangements intended

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[158] Department of Agriculture for Scotland, *Report of the Commission of Enquiry into Crofting Conditions* (Edinburgh: Stationary Office, 1954) pp. 35-36.

[159] J. Steinbeck, *The Grapes of Wrath* (London: Penguin Classics 2001).

[160] P. Hutcheon "Over 60,000 acres of land in Scotland owned by Panama companies" *The Herald* (Glasgow: 10 April 2016).

[161] S. Stevenson, *So Much Wind* (Edinburgh: Berlinn 2013) pp. 43-46.

to reduce greatly, or even eliminate, effective taxation of landed wealth".[162] A 2013 article in The Guardian described them as "the world's most successful benefit tourists".[163]

2.2.7 THE POLITICS OF REFORM

The political climate that has facilitated contemporary reforms can be observed in the many policy documents, committee meetings, and debates emanating from Holyrood.[164] Scottish Land & Estates which represents the interest of landowners and farmers in Scotland described the LR(S)A 2016 as being marked by "raw anti-landowner sentiment" pointed towards an "incessant clamour for radicalism".[165] To others, the reforms do not go far enough. On the main stage at the SNP conference in 2015 one member exclaimed that current landowners "stole the land" and "anyone who bought the land from the people who stole it first of all are guilty of reset". This resulted in enthusiastic applause from the delegates.[166] There are also many notable, and often unfortunate quotes that have been seized upon by the media, or those seeking to help divide others further. The historian Hunter was quoted promising that "when the sporting estate is dead and buried, I'll lead the dancing on its grave".[167] The MSP Bill Aitken was quoted in 2002 describing contemporary land reform as "social engineering" such as that found in "Zimbabwe, North Korea and Cuba" and described the then Land Reform Bill as "a land grab of which Robert Mugabe would be proud".[168] This resulted in a memorable and unfortunate headline in *The Daily Mail* on the passing of the LR(S)A 2003.[169]

While the headlines are grabbed by the controversial views outlined above, what this does is to denigrate the politics of reform into stereotypes. Churlish tweed-clad landowners and radical leftist campaigners wrapped in hemp stand in an intractable standoff, unable to appreciate the other side's perspective. It is important to emphasise that the political debate is significantly more complicated than it is often portrayed in the media. That being so, it is not controversial to state that Holyrood and those who support land reform represent political parties and groups whose

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[162] Scottish Affairs Committee Briefing Paper (n 99) para 2.5.

[163] G. Monibot, "Farming subsidies: this is the most blatant transfer of cash to the rich" *The Guardian* (London: 2 July 2013).

[164] See *inter alia* LRRG, *The Land of Scotland and the Common Good* (n 122); LRPG, *Recommendations for Action* (n 115).

[165] S. Johnson, "Scotland's lairds: We are SNP land reform 'whipping boys'" *The Telegraph* (London: 16 March 2016).

[166] S. Johnson, "SNP members rebel in demand for radical land reform" *The Telegraph* (London: 16 October 2015).

[167] J. Glass et al (n 85).

[168] A. Cramb, "Crofters' Bill 'like Zimbabwe land grab'" *The Telegraph* (London: 20 March 2002).

[169] E. Barnes, "Let the Land Grab Begin" *The Scottish Daily Mail* (Glasgow: 24 January 2003).

underpinning ideology sits on the left of the political compass and those who represent the interest of landowners tend to be more conservative.

2.2.8 PUBLIC POLICY AND LAND REFORM

Land reform encompasses a diverse range of public policy concerns. A comprehensive account within the confined of this thesis is not possible, but several points should be emphasised.[170] The land question was of limited legislative and political importance until the last few years of the twentieth century. It was with the election of Labour in 1997 and the establishment of the Scottish Executive in 1999 that land reform was pushed up the legislative agenda. The result was the appointment of Lord Sewel to the LRPG, which was given the remit to: "identify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on the social and economic development of rural communities and the natural heritage".[171] The LRPG published three documents, Identifying the Problems, Identifying the Solutions and Recommendations for Action. The LRPG aimed to transform Scottish land law.[172] Speaking in 2013, the First Minister of Scotland called for the doubling of community-owned land in Scotland to 1 million acres by 2020. Statistics published in December 2017 showed that an additional 437,770 acres would have to come into community ownership to achieve this target by 2020.[173]

In May 2014, the LRRG published its final report, "The Land of Scotland and the Common Good".[174] The report reflects the importance of land as a finite resource, and explores how the arrangements governing the possession and use of land facilitate or inhibit progress towards achieving a Scotland which is economically successful, socially just and environmentally sustainable.[175] It runs over two hundred and sixty pages and makes over sixty recommendations on a wide range of topics, noting that there was "no single measure, or 'silver bullet', which would modernise land ownership patterns in Scotland and deliver land reform measures which would better serve the public interest".[176] The diversification of ownership through community

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[170] J. Cowley, "The coming battle over land and property" *New Statesman* (London: 19 October 2010).

[171] LRPG *Identifying the Problems* (n 38).

[172] LRPG *Recommendations for Action* (n 115).

[173] Scottish Government, "Estate of Community Owned Land in Scotland 2017 Experimental Statistics" (n 78) p. 1.

[174] LRRG, *The Land of Scotland and the Common Good* (n 122).

[175] Ibid p. 9.

[176] Ibid p. 238.

ownership is described in one Scottish Parliament Research Briefing paper as the "key land reform policy".[177]

In September 2017, the Scottish Ministers published the Scottish Land Rights and Responsibilities Statement ("SLRRS"). Together with the Scottish Land Commission's Strategic Plan, the statement underlines the Government's commitment to on-going and long-term land reform.[178] The SLRRS breaks land reform into six "principles", that focus on the need for the realisation of human rights, a balance of public and private interest, a shift towards an egalitarian pattern of land ownership, community engagement, environmental stewardship, greater transparency and community collaboration.[179] These principles are important as they emphasise the public policy behind the rights to buy. It is the impact A1P1 has had and will continue to have on these rights to buy that are at the core of the analysis of this thesis.

2.2.9 CONCLUSIONS ON THE SCOTTISH LAND QUESTION

As the above section has shown, the Scottish land question can be broken down into four primary concerns; (i) historical, most notably the legacy of dispossession and the Highland Clearances; (ii) absentee landowners, transparency of ownership, and tax avoidance; (iii) the high concentration of ownership; and (iv) the public policy of reform, as exemplified in the LRRG 2014 report. Caution is always necessary when considering the Scottish land question as, while these four concerns are often cited, they remain open to criticism and are understudied, especially by impartial observers. It is not possible within this thesis to discuss these issues in any more detail. Considerable information is available in the various reports produced by the LRPG, LRRG, and the House of Commons Scottish Affairs Committee.[180]

[177] A. Reid, SPICe Briefing: Land Reform in Scotland SPICe Briefing 15/28 (Edinburgh: The Stationary Office 2015) p. 16.

[178] Scottish Government, *Scottish Land Rights and Responsibilities Statement* (Edinburgh: The Stationary Office 2017).

[179] Ibid p. 9.

[180] Scottish Affairs Committee, Eighth Report of Session 2014-15, *Land Reform in Scotland: Final Report*, HC 274; Scottish Affairs Committee, Eighth Report of Session 2013-14, *Land Reform in Scotland: Interim Report*, HC 877.

2.3 CHAPTER ONE: PART 2

2.3.1 CONTEMPORARY LEGISLATIVE REFORMS

The previous section has highlighted the political desire for land reform in Scotland. It has emphasised the historical background and the contemporary problems that have made the diversification of ownership a justifiable legislative endeavour. This section shall set out concepts of land reform and show how Scotland, by focusing on community ownership, is implementing a distinct form of property re-ordering.

The reconstitution of the Scottish Parliament has resulted in a near revolution in Scots property law. As Lord Gill observed, "modern legislation in this area, has achieved more radical and valuable reforms within a few years than it had achieved in the previous century".[181] The government introduced the Abolition of Feudal Tenure etc. (Scotland) Act 2004, which on the "appointed day" removed the feudal system of land holding in Scotland.[182] Further reforms were brought in by the Title Conditions (Scotland) Act 2003 which effectively introduced a code governing most perpetual obligations affecting land. The Tenements (Scotland) Act 2004 codified the law of condominium.[183] The volume of legislation in this area is vast,[184] and more legislation is forthcoming.[185]

It is therefore important to outline in detail the primary pre-emptive and absolute rights to buy that the Scottish Ministers primarily hope will facilitate the realisation of the six principles outlined in the SLRRS. These are:

- The community right to buy ("CRtB")
- The crofting community right to buy ("CCRtB")
- The right to buy abandoned and neglected land ("RtBAN")
- The right to buy for sustainable development ("RtBSD")

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[181] R. Rennie (ed), *The Promised Land: Property Law Reform* (Edinburgh: W. Green, 2008).

[182] Abolition of Feudal Tenure etc. (Scotland) Act 2000 s.1(1).

[183] Tenement (Scotland) Act 2004.

[184] Abolition of Feudal Tenure etc. (Scotland) Act 2000; Housing (Scotland) Act 2001; Land Reform (Scotland) Act 2003; Title Conditions (Scotland) Act 2003; Agricultural Holdings (Scotland) Act 2003; Tenements (Scotland) Act 2004; Crofting Reform etc. Act 2007; Crofting Reform (Scotland) Act 2010; Land Registration etc. (Scotland) Act 2012; Long Leases (Scotland) Act 2012; Crofting (Amendment) (Scotland) Act 2013; Housing (Scotland) Act 2014; Community Empowerment (Scotland) Act 2015; Land Reform (Scotland) Act 2016.

[185] The Forestry and Land Management (Scotland) Bill; Islands (Scotland) Bill.

- The agricultural tenants right to buy ("ARtB")
- The agricultural tenants right to buy where a landlord is in breach (ARtBB")

These reforms are often the focus when commentators and politicians speak of "land reform", whereas much of the legislation modernises and consolidates property law.[186] It is important to note that what this thesis has termed rights to buy, are not the only means by which the public powers may be used in Scotland to purchase land. However, others will not be discussed in this thesis.[187]

The proceeding section will set out what this thesis has termed the six "rights to buy". It will illustrate, in brief, the background to each and will give an outline of the procedure. In doing so, it will highlight several important judicial decisions and comment upon the effectiveness of the existing sales orders.

- The community right to buy ("CRtB")
- The crofting community right to buy ("CCRtB")
- The right to buy abandoned and neglected land ("RtBAN")
- The right to buy for sustainable development ("RtBSD")
- The agricultural tenants right to buy ("ARtB")
- The agricultural tenants right to buy where a landlord is in breach (ARtBB")

2.3.2 THE COMMUNITY RIGHT TO BUY

The "original" community right to buy was introduced by part 2 of the LR(S)A 2003 as amended by the CE(S)A 2015 and was brought into force on 14 June 2004.[188] Under part 2, a community body ("CB") can apply to Ministers to register an interest in land that is not excluded,[189] this includes additional rights such as salmon fishing and mineral rights.[190] It is important to emphasise

[186] Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish Land Question" (n 30) 291.

[187] For example, the law of compulsory purchase in the Town and Country Planning (Scotland) Act 1997; tenants-at-will (an idiosyncratic landholding arrangement) also have a right to buy under the Land Registration Act 1979; Rural housing burden in Title Conditions (Scotland) Act 2003 can create pre-emptive rights that effect the degree of control of housing bodies.

[188] Land Reform (Scotland) Act 2003 (Commencement Order No 2) Order 2004 SI2004/247.

[189] LR(S)A 2003 s. 33; The Community Right to Buy (Definition of Excluded Land) (Scotland) Order 2004.

[190] Ibid s. 33(2A).

that the original community right to buy requires the owner(s) to consensually sell of the land subject to registration. As such, it should be considered more akin to a "right to register", or a right for the CB to stand *first in line* if the landowner chooses to sell in the future.

Chapter two of part 2 of the LR(S)A 2003 outlines the procedure for the community right to buy. Registration can be undertaken under the "timeous application" procedure in section 37 and 38 where no sale of the land to which the registration related is anticipated.[191] Section 39 adds the second mechanism for a "late application" where action had been taken which, if a community interest had been registered, would be prohibited.[192] The late application procedure is only accepted in "exceptional circumstances".[193] As of April 2005, unawareness of the legislation is no longer regarded as a valid reason for not submitting a timeous registration.[194]

The Act requires the CB to define "community" during the application.[195] The community is defined by an area of land covered by a full postcode.[196] Members of the community must also be registered to vote at a local government election at an address within the postcode unit or units defining the community.[197] The LR(S)A 2003 originally required that the community had to appear to the Ministers to be rural and not exceed a population of 10,000, but this was removed by the LR(S)A 2016.[198]

Ministers need to be satisfied that the registration is in the public interest,[199] and is consistent with furthering sustainable development.[200] Once the CRtB is confirmed, the owner is entitled to compensation at market value.[201] The new guidance has affirmed this stating that "the community

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[191] Ibid s. 38.

[192] Ibid s. 39(1), 1(A), and (1B).

[193] Ibid s. 39(1A) and 40(5); Scottish Government, *Guidance for Applications made on order 15 April 2016* (Edinburgh: The Stationary Office, 2016) para 60.

[194] M. Combe, "No place like Holme: community expectation and the right to buy" (2007) 11 *Edinburgh Law Review* 109, 112.

[195] LR(S)A 2003 s. 34(5)

[196] Ibid s. 34(5).

[197] Ibid.

[198] Ibid.

[199] Ibid. s. 38(1)(e) and 51(3)(c); Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193) para 90.

[200] LR(S)A 2003 s. 34(4) and s. 51(3)(c).

[201] Ibid s. 59(6) and (7).

right to buy process is not intended to be used as a means to stop the landowner from developing their land in any way".[202] It is also apparent that it is not considered in the public interest for the right to buy to subvert the planning process. This is because the grant of planning permission, itself, is viewed as being in the public interest.[203]

2.3.2.1 CONCLUSIONS ON THE COMMUNITY RIGHT TO BUY

The community right to buy does have the potential to be a positive mechanism for communities. To Bryden and Geisler, "the community's right to buy is fundamentally a right 'to be' and to secure a place-based arena of common identity and interests, protected by legal title".[204] However, a 2012 Scottish Government report noted that the high drop-out rate and lower than expected use of the CRtB was due to: land not coming on to the market or being withdrawn; complex, resource-intense legislation; applications being rejected due to them being late or flawed; and a lack of resources and finances to purchase land.[205] Uptake has, however, been significant. As of 1 June 2018, there were 234 entries in the register, although the majority have already been deleted.[206] One of the few available studies was published in 2015 by Ipsos MORI and Scotland's Rural College. This report gives some guidance on existing and future problems.[207] It concludes that most of the key promises remain unfulfilled and there remains a lack of detailed economic analysis of the full effect of these measures.

2.3.3 CROFTING LAW

Giving evidence to the RACCE Committee in 2015, Peter Peacock from Community Land Scotland gave a warning.

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[202] Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193) para 70.

[203] Combe, "No place like Holme: community expectation and the right to buy" (n 194) 114.

[204] J. Bryden and C Geisler, "Community-based land reform: Lesson from Scotland" (2007) 24 *Land Use Policy* 24, 25.

[205] Scottish Government, *Overview of Evidence on Land Reform* (Edinburgh: The Stationary Office, 2012) p. 16.

[206] Registers of Scotland, *Register of Community Interest in Land* <https://www.eservices.ros.gov.uk/rcil/ros/rcilcb/presentation//ui/pageflows/viewCountySummary.do> [accessed 1 June 2018].

[207] C. Mulholland et al "Impact Evaluation of the Community Right to Buy" (Edinburgh: Scottish Government Social Research, 2015).

> It is said that only three people understand crofting law—one is mad, one is dead and nobody can remember who the third one is. Actually, to be fair, that was said of local government finance.[208]

This is a rather suitable adaption of the famous quote accredited to Lord Palmerston about the Schleswig-Holstein question.[209] Much like the Schleswig-Holstein question, most today will never have heard of crofting law. Further, most will not be able to point on a map to where its complexity can be found. There can be little doubt that both will be met with a justifiable look of tedium if brought up in conversation. Crofting is a very technical and specialised area of Scots law that is saturated with history and politics.[210]

The best definition of a croft remains that it is "an area of land surrounded by a sea of legislation".[211] Crofting is a creation of the Crofters Holdings (Scotland) Act 1886 (CH(S)A 1986), which came from the findings of the 1883 Napier Commission.[212] CH(S)A 1886 established the "Crofters Commission" which was a quasi-judicial body regulating crofting tenure.[213] This was abolished in 1911 and replaced by the Land Court. The Crofters (Scotland) Act 1955 created a new Crofters Commission, whose functions were regulatory and administrative, rather than quasi-judicial.[214] In 2010 the name of the Crofters Commission was changed to "The Crofting Commission".[215]

In practice, a croft is a small area of land that can roughly range between one and fifty acres that are generally worked by a family group alongside common grazing. The system is designed to control and safeguard security of tenure and maintain communities on some of Scotland's most marginal land. Crofts were originally distinct to the "crofting counties". However, the Crofting Reform etc. Act 2007 gave the Scottish Ministers the power to extend crofting tenure.[216] The

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[208] SP, OR, RACCE, 18 February 2015, col 29.

[209] Per Lord Palmerston "only three men in Europe understood it [the Schleswig-Holstein question]. One was Prince Albert, who is dead. The second was a German professor who went mad. I am the third and I have forgotten all about it".

[210] A. McAllister, *Scottish Law of Leases* (London: Bloomsbury 2013) chapter 13.

[211] Agnew (n 24).

[212] Crofting Holdings (Scotland) Act 1886.

[213] Ibid s. 18-20.

[214] Crofters Holding (Scotland) Act 1955.

[215] Crofting Reform (Scotland) Act 2010 s. 1(1).

[216] Crofting Reform etc. Act 2007 s. 6; The Crofting (Designation of Areas) (Scotland) Order 2010, SI29.

modern law of crofting is largely governed by the Crofters (Scotland) Act 1993 ("C(S)A 1993"), which has been amended. While crofting is a unique form of leasehold tenure, it remains a legal relationship between landlord and tenant.[217]

There is a long history of crofters being able to purchase their croft land and ancillary rights, being first introduced in the Crofting Reform (Scotland) Act 1976.[218] This was amended by the Crofters (Scotland) Act 1993 ("C(S)A 1993"). Under C(S)A 1993 section 12, crofters could apply to the Scottish Land Court for authority to acquire the "croft land".[219] The right to apply to the Land Court only arises after there has been an attempt to negotiate a sale, which has failed.[220] Under section 13 the Land Court can make an order forcing sale of all, or part, of the croft land,[221] provided that the Land Court does not deem that the sale will cause a "substantial degree of hardship" to the owner or be "substantially detrimental to the interests of sound management of the estate of the landlord".[222] The compensation payable to the deposed owner is calculated at the current rent (or the rent fixed by the Land Court as a fair rent on an application by the landlord) multiplied by the factor of 15.[223] The Transfer of Crofting Estates (Scotland) Act 1997 was intended to facilitate the sale of a large number of government-owned crofting estates to crofting communities.[224] However, there was, in fact, no take up on the part of the crofting communities, most of which were perfectly happy with the Secretary of State for Scotland and, post-devolution, the Scottish Ministers, as their landlord, until the West Harris buy-out in 2010.[225]

2.3.3.1 CROFTING COMMUNITY RIGHT TO BUY

The crofting community right to buy ("CCRtB") is contained in part 3 of the LR(S)A 2003. The 2003 Act provides a right to buy croft land. Croft land, in general, consists of crofts as defined by

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[217] *Sutherland v Sutherland* 1986 SLT 22 (Land Ct).

[218] McAllister (n 210) p. 392.

[219] C(S)A 1993 s. 12(1).

[220] Agnew (n 24) p. 79; *Anderson v Houston* 1991 SLCR 11 (Land Ct).

[221] *MacPhee v South Uist Estates Ltd* 1985 SLCR 108 (Land Ct).

[222] *Geddes v Martin* 1986 SC 298 (IH) [110].

[223] C(S)A 1993 s. 14(3).

[224] Transfer of Crofting Estates (Scotland) Act 1997 s. 1 and s. 2.

[225] J. Ross, "Historic sale of estate to community set to rejuvenate life on Isle of Harris" *The Scotsman* (Edinburgh: 26 January 2010).

section 3 of the C(S)A 1993 and land over which croft tenants have grazing.[226] The CCRtB may also cover "eligible additional land" held by the croft landowner which is contiguous with the croft land.[227] The right to buy also extends to a tenant's interest in a lease over croft land other than a croft tenancy or a tenancy of a dwelling-house. The purchase of such an interest brings the lease to an end and is, in effect, a resumption of the land.[228]

Only a crofting community body can exercise the CCRtB.[229] Such a body must be a company limited by guarantee. Its articles of association must provide that the company can exercise the right to buy under part 3, that the majority of the members of the company must be members of the crofting community, and that such members shall have control of the company.[230] The Scottish Ministers must confirm that the body's main purpose is consistent with furthering sustainable development.[231] The LR(S)A 2003 makes elaborate provision for the membership of the crofting community body. In general, the membership consists of those who are resident on croft land or land contiguous with it or are tenants of croft land who live in the locality.[232]

A crofting community body may buy additional eligible land without the landowner's consent, but only if the Land Court so determines.[233] The Land Court may authorise the purchase of such additional land only if it is satisfied that the purchase is essential to the development of the crofting community and that such development is compatible with furthering sustainable development.[234] The consideration payable to the landowner is ascertained by valuation determined by a person appointed by the Scottish Ministers. It consists of a sum representing the open market value of the land acquired, together with compensation for disturbance.[235]

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226 LR(S)A 2003 s. 68.

227 Ibid s. 70.

228 Ibid s. 69A.

229 Ibid s. 73(1).

230 Ibid s. 71(1).

231 Ibid s. 74(4).

232 Ibid s. 71(5) and (6).

233 Ibid s. 77.

234 Ibid s. 77(3)(a) and s. 77(3)(b).

235 LR(S)A 2003 s. 88(5), (6).

2.3.3.2 THE CROFTING COMMUNITY RIGHT TO BUY IN PRACTICE

The CCRtB has been used sparingly, the 26,000 acre Pairc Trust and the 56,000 acre Galston Trust, both on the Isle of Lewis, being the only two. Other buyouts, such as 93,000 acres South Uist Estate were purchased through negotiations without the need for a CCRtB application. The Scottish Government published a report in 2012 that noted that the process remains "onerous, complex and resource-intensive" with uptake being "much lower than had originally been anticipated".[236] The report noted that part 3 has come to be viewed as a "fall-back position of last resort" and the lack of funding, support and advice combined with demanding mapping requirements had become barriers to the successful implementation of the CCRtB.[237]

2.3.4 THE RIGHT TO BUY ABANDONED AND NEGLECTED LAND

The Community Empowerment (Scotland) Act 2015 ("CE(S)A") part 4 introduces part 3A into the LR(S)A 2003. This allows all communities, not just rural, to apply for ministerial approval to acquire "neglected" or "abandoned" land.[238] The CE(S)A 2015 has broadened the non-profit organisation that can constitute a community body. These are companies limited by guarantee, a Scottish charitable organisation and a community benefit society.[239] While the CRtB is pre-emptive, the right to buy abandoned or neglected land is absolute, being limited only by the conditions placed on Ministers when granting consent. Part 3A came partly into force on 30 June 2017 and creates a "New Register" for applications for the right to buy abandoned and neglected land.[240]

Eligible land is land that is "wholly or mainly abandoned or neglected, or the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental well-being of a relevant community".[241] Harm includes "the environmental effects of which have an adverse effect on the lives of persons comprising the relevant community", and "does not include harm which, in the opinion of Ministers, is negligible".[242] This does not include "land on which

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[236] Scottish Government, *Overview of Evidence on Land Reform* (Edinburgh: The Stationary Office 2012) p. 28.

[237] Ibid.

[238] CE(S)A 2015 Pt 4.

[239] LR(S)A 2003 s. 97D.

[240] Ibid s. 97F; SSI 2017/192.

[241] Ibid s. 97C(2)(a) and (b).

[242] LR(S)A 2003 s. 97C(3)(a).

there is a building or other structure which is an individual's home", "eligible croft land", and "land which is owned or occupied by the Crown by virtue of its having vested as *bona vacantia* in the Crown".[243] In a similar manner to existing sales orders, Pt 3A requires the transfer of land to be likely to further sustainable development.

From a theoretical point of view, this is an interesting development as it appears that the Scottish Government has taken an almost utilitarian view of ownership. In that, if an owner is not utilising their property, their title becomes subject to challenge under part 3A and can be forcefully transferred. All of this is left to the discretion of the Scottish Ministers which may become problematic. Interestingly, perhaps the most detailed study on compulsory purchase powers for abandoned and neglected land was written in 2011 by the American Brooking-Rockefeller Foundation in a report entitled "Recapturing Land for Economic and Fiscal Growth".[244]

The right to buy abandoned and neglected land was subject to considerable criticism during consultation.[245] The real difficulty will most likely come in defining what constitutes abandoned and neglected land. This will be discussed in chapter four.

2.3.5 THE RIGHT TO BUY FOR SUSTAINABLE DEVELOPMENT

The LR(S)A 2016 part 5 introduces the "right to buy land to further sustainable development" ("CRBSD"), introducing a "new" community right to buy, which is likely to come into force in 2019.[246] Replicating the original CRtB, community is defined in a geographic sense by postcode unit.[247] The community body can be constituted as a company limited by guarantee, a Scottish charitable incorporated organisation and a community benefit society.[248] Land is defined as all land which is not "excluded". The LR(S)A 2016 makes an individual's home excluded land and in doing so helps protect individuals' Article 8 rights to a home and family life.[249] Communities must register

[243] Ibid s. 97C(5).

[244] A. Mallach and J. Vey, *Recapturing Land for Economic and Fiscal Growth* (Washington DC: Brooking-Rockefeller Foundation, 2011).

[245] Scottish Government, *Analysis of consultation response* (Edinburgh: The Stationary Office 2016).

[246] LR(S)A 2016 Pt 5.

[247] Ibid s. 42(5) (11).

[248] Ibid s. 49(2)-(4).

[249] Ibid s. 46.

their interest in the New Register and apply to the Scottish ministers for consent to buy land for the proposed purpose of "furthering sustainable development".[250]

The tests for approval of a right to buy in part 5 gives a more detailed legislative definition of what constitutes the public interest and sustainable development than is found in the original CRtB and the CCRtB. LR(S)A 2016 section 56 states that when considering an application, the Scottish Ministers must not consent unless they are satisfied that the sustainable development conditions are met. This means that it must be shown that the transfer of land is likely to further the achievement of sustainable development, is in the public interest, is likely to result in significant benefit to the relevant community, and is the only practicable, or the most practicable, way of achieving that significant benefit, and not granting consent to the transfer of land is likely to result in harm to that community. In determining what constitutes significant benefit the Scottish Ministers must consider, economic development, regeneration, public health, social well-being, and environmental wellbeing.[251] Part 5 of the LR(S)A 2016 has not yet entered into force. The right to buy for sustainable development is only conditional on ministerial consent.[252]

2.3.6 THE LAW OF AGRICULTURAL LEASES

The law of leases relating to agricultural land in Scotland, applies to land that does not constitute croft land or a small holding. The AH(S)A 2003 and the AH(S)A 2016 regulates agricultural leases and "agricultural holdings" are regulated by the Agricultural Holdings (Scotland) Act 1991 ("AH(S)A 1991"). For over 130 years there have been statutory regulations for agricultural leases.[253] The current primary legislation is the AH(S)A 1991 as amended.[254] Much like crofting law, and indeed, the Schleswig-Holstein question, agricultural holdings law, is unbeknown to most who want to remain sane. As the practitioner Blair admits, "agricultural holdings law has one distinctive feature - most lawyers, when students, were told to be very cautious of getting involved".[255] This is complicated by the reality that recent changes have brought about "greater

[250] LR(S)A 2016 s.49(7).

[251] Ibid s. 56(12).

[252] Combe, "The Land Reform (Scotland) Act 2016: another answer to the Scottish Land Question" (n 30) 305.

[253] Gill (n 23); *James* (n 61).

[254] AH(S)A 1991.

[255] M. Blair, "Agricultural holdings law and Land Reform (Scotland) Act 2016" (2016) 143 *W. Green: Property Law Bulletin* 1.

change in the tenanted sector of Scottish agriculture than any legislation since 1883".[256] In the latter part of the nineteenth Century over 90% of farms in Scotland were tenanted.[257] However, tenant farming in Scotland is undoubtedly in decline. Since 1982 the amount of tenanted agricultural land has declined by more than 40%. At present, only about 23% of agricultural land is subject to tenancy.[258]

The AH(S)A 1991 defines "agricultural holding" as "the aggregate of the agricultural land comprised in a lease, not being a lease under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord".[259] "Agricultural land" is defined as "land used for agriculture for purposes of a trade or business" or land designed so by the Secretary of State.[260] The definition of what constitutes a 1991 Act tenancy is often disputed and frequently leads to litigation. This is, in part because a 1991 Act tenancy does not require a written lease. Even if a written lease does exist the practical reality of occupation may be found contrary to the lease and to lead to unintended consequences.

The effect of the AH(S)A 2003 was to create a threefold classification of agricultural tenancies, namely; (i) 1991 Act tenancies; (ii) two forms of new limited duration tenancies; and (iii) leases for grazing or mowing.[261] The LR(S)A 2016 replaced the "limited duration tenancy" with the "modern limited duration tenancy".[262] *Inter alia* this allows for the conversion of 1991 Act tenancies into modern limited duration tenancies.[263]

The principle of freedom of contract generally applies in the law of leases; but since one important aspect of the legislation is the protection of the tenant in various ways, the principle is overridden by many of its provisions. A Scottish Government report in 2015 found that around 80% of tenanted land (excluding seasonal lets) is leased through a 1991 Act tenancy.[264]

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256 Gill (n 23) p. 1.

257 SPICe Briefing, *Tenant farming 14/52* (Edinburgh: The Scottish Government 2014) p. 3.

258 Gill (n 23) p. 4.

259 AH(S)A 1991 s. 1(1).

260 Ibid; Agricultural Holdings Act 1948 s. 86(1); *O'Donnell v McDonald* [2007] CSIH 74, 2007 SLT 1227.

261 AH(S)A 2003 s. 4, 5 and 5A.

262 LR(S)A 2016 ss. 85-89.

263 Ibid s. 90(2A).

264 AHLRG, *Review of Agricultural Holdings Legislation Final Report* (Edinburgh, The Stationary Office 2015) para 30.

2.3.6.1 AGRICULTURAL TENANT'S PRE-EMPTIVE RIGHT TO BUY

Before proceeding it is important to highlight that while part 2 of the AH(S)A 2003 is titled the "tenant's right to buy land", the Act does not confer a right to buy such as that given to crofters or tenants of public sector housing.[265] As Lord Gill noted, "[t]he expression 'right to buy' is, therefore, inaccurate. Nevertheless, it is in common use throughout the agricultural world by farmers and lawyers alike".[266]

Part 2, which came into effect on 15 December 2004, introduced the tenant's right to buy for land leased under the AH(S)A 1991.[267] The policy was to allow tenants to buy their farms.[268] As originally passed, the tenant's right to buy required registration in the register of community interests in land, that had to be renewed every five years to remain valid.[269] Section 99 of the LR(S)A 2016 removed the requirement to register.[270] This was contrary to the view of the Agricultural Holdings Legislation Review Group who concluded that the removal of the registration requirement would not be in the interests of agricultural tenants.[271]

The right to buy applies throughout the subsistence of the tenancy. It does not restrict the right of the landlord to terminate the tenancy on any available ground and thereafter to sell the land with vacant possession.[272] The tenant's right to buy is pre-emptive like the CRtB, in that it requires a willing seller. The AH(S)A 2003 states that two possible trigger events activate the right to buy provisions.

1. Where the owner or the creditor with the right to sell land in respect of which the tenant has registered an interest gives notice to the tenant of a proposal to transfer the land, or any part of it.[273]

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[265] Gill (n 23) p. 379.

[266] Ibid.

[267] AH(S)A 2003 (Commencement No 4) Order 2004 SI2004/511.

[268] *Fish v Church of Scotland General Trustees* 2013 SLCR 74 (Land Ct) [51].

[269] AH(S)A 2003 s. 24(2) (as passed prior to amendment); C. Anderson, "Agricultural tenants and the right to buy: some thoughts on Part 2 of the Agricultural Holdings (Scotland) Act 2003" (2006) 38 *SLT (News)* 241, 241-245.

[270] LR(S)A 2016 s. 99.

[271] AHLRG (n 264) para. 24.

[272] *North Berwick Trust v James B Miller & Co* [2009] CSIH 15, 2009 SC 305 [4].

[273] AH(S)A 2003 s. 26 and s. 28)(1)(a).

2. Where the owner or the creditor "takes any action" with a view to such a transfer and the transfer is one of which notice to the tenant is required.[274]

The introduction of the agricultural tenant's pre-emptive right to buy has been perhaps the most controversial part of land reform in Scotland.[275] The most important case concerning the agricultural tenant's right to buy, and the wider debate about property rights and law reform, is the unanimous Supreme Court decision of *Salvesen v Riddell*.[276] Further, the large number of notices to quit served on tenants and the *McMaster v Scottish Ministers* litigation highlights the unintended negative consequences of reform.[277]

2.3.6.2 THE AGRICULTURAL TENANT'S RIGHT TO BUY WHERE THE LANDLORD IS IN BREACH

The LR(S)A 2016 section 100 amends the AH(S)A 2003 with a new Pt 2A introducing the right for a tenant to apply to the Land Court for an order of sale "where the landlord is in breach".[278] This came partially into force on 23 December 2016.[279] This enables a tenant to apply to the Land Court for an order for sale of the holding where the landlord is in breach of obligations under the tenancy, and this is affecting the tenant's ability to farm in accordance with the rules of good husbandry.[280] This provision appears to be a tool attempting to reduce the perceived problem of poor land management either through subtle coercion to promote "good land management" or, if this fails, to force a sale.

The new AH(S)A 2003 section 38A sets out the circumstances in which a tenant can make an application to the Land Court for an order of sale. This includes where the landlord has failed, in

[274] Ibid s. 28(1)(b)(i) and (ii); *Fish* (n 268) [53].

[275] SPICe Briefing, *Tenant farming 14/52* (n 197) p. 13.

[276] The first successful challenge to the competency of Scottish Parliament legislation was *Cameron v Cottam* [2012] HCJAC 19.

[277] *McMaster* (IH) (n 5).

[278] LR(S)A 2016 s. 100; AH(S)A 2003 Pt 2A.

[279] SSI 2016/365 reg. 2, Sch. 1 para 1.

[280] LR(S)A 2016 Explanatory Notes para. 423.

a material regard, to comply with a previous order or award by the Land Court under the section.[281] The Land Court must be satisfied that "the failure substantially and adversely affects the tenant's ability to fulfil the tenant's responsibilities to farm the holding in accordance with the rules of good husbandry, greater hardship would be caused by not making the order than by making it, and in all the circumstances it is appropriate".[282] Section 38B(7) states that AH(S)A 2003 Schedule 6 of the Agriculture (Scotland) Act 1948 is to define the "rules of good husbandry".[283] The 1948 Act gives a relatively long definition of good husbandry as including *inter alia*: "the occupier is maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future".[284]

Compensation provisions are contained in Section 38E AH(S)A 2003 which outlines that it is for the tenant to make the offer to buy. The offer is to be at a price agreed between parties where there is no such agreement, compensation is to be determined following section 34(8) AH(S)A 2003 by the appointment of an independent valuer, or by appeal to the Land Court.[285] Section 38G makes provision for the process for the appointment of the valuer and valuation of the land where the tenant and the landlord cannot agree on a price.[286] This is governed and calculated under the same mechanisms outlined in section 33 to 36 of the AH(S)A 2003 relating to the original tenant's right to buy in the 2003 Act.[287]

2.3.7 THE SCOTTISH LAND COMMISSION

The LR(S)A 2016 established the Scottish Land Commission ("the Commission") as an executive non-departmental public body.[288] The came into being on 1 April 2017.[289] There are six Commissioners, including one tenant farming commissioner, supported by a small team of administrative staff, based in Inverness. The functions of the Commissioners are on any matter

[281] AH(S)A 2003 s. 38A(1) and (2); s. 84(1)(b).

[282] Ibid s. 38B.

[283] Ibid s. 38B(7).

[284] Agriculture (Scotland) Act 1948 Sch 6.

[285] AH(S)A 2003 s. 38E.

[286] Ibid s. 38G.

[287] Ibid ss. 33-36.

[288] LR(S)A 2016 Part 2.

[289] Ibid.

relating to land in Scotland: to review the impact and effectiveness of any law or policy; to recommend changes to any law or policy; to gather evidence, to carry out research, to prepare reports; and to provide information and guidance.[290] Matters relating to land include; ownership and other rights in land, management of land, use of land; and the land use strategy prepared under section 57 of the Climate Change (Scotland) Act 2009.[291] The tenant farming commissioner is to, *inter alia*, prepare a separate code of practice on agricultural holdings, to investigate alleged breaches, to make recommendations to improve the relationship between agents, tenants and landlords.[292] The first strategic plan, published by the Commission in September 2017, states that:

> It [the Commission] has been given an initial remit by Scottish Ministers that is as ambitious as it is wide-ranging. The Scottish people now have a mechanism for driving forward land reform that previous generations could only have dreamt of.[293]

The strategic plan states that the Commission will review the impacts of the scale and concentration of land ownership; review the effects of ownership structures, tax and fiscal arrangements on the public interest; and improve the effectiveness of community right to buy mechanisms and identify measures to secure more community benefit, use and ownership from Common Good.[294] The Commission stated in its 2017 strategic plan that

> Land reform is a continuous process, it is not an event. It is the means whereby the legislative, policy and cultural framework within which land is owned, managed and used continuously evolves so that it maintains its relevance in a changing economic, social and cultural context. It is the task of the Scottish Land Commission to ensure that this framework evolves fast enough to keep up with change, and in ways that fully reflect that shifting context. It is, in short, both a pressing and a long-term job.[295]

The future of land reform and the narrative surrounding Convention rights and land law in Scotland are likely to be considerably shaped by the Land Commission. While it remains a relatively new institution, its importance should not be underestimated.

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[290] Ibid s. 22(1).

[291] Ibid s. 22(5).

[292] Ibid s. 24 and 27.

[293] SLC, *Making More of Scotland's Land: Out Strategic Plan 2018 to 2021* (Inverness: Scottish Land Commission 2017).

[294] Ibid.

[295] Ibid.

2.3.8 UNFINISHED BUSINESS

As Lord Sewel wrote in the LRPG's 1999 paper Recommendations for Action, "[i]t is crucial that we regard land reform not as a once-for-all issue but as an on-going process".[296] Land law reform remains on the legislative agenda. This may result in new primary legislation or regulations being brought forward in the coming years. It is therefore imperative when considering the application of human rights to remember what has been omitted from recent reforms and what other measures may be attempted in the future. The legislation discussed above may be a stepping-stone towards more radical changes.

Proposals to increase transparency in the ownership of land by companies registered in British Overseas Territories and Crown dependencies were defeated.[297] This may prove to be one of the most controversial rejected amendments as it is estimated that such companies own 750,000 acres in the Highlands.[298] The initial proposal to limit the total amount of land that one individual can own were omitted from the LR(S)A 2016. A discussion paper, published in March 2018, has once again proposed the introduction of a restriction or fixed limit to landholdings.[299] Calls for a limit on the class of people who may own land in Scotland will also remain. While the free movement of capital halted this beyond rhetoric, it is unlikely that those who wish to see land in the hands of "Scots" or even "resident" landlords will remain silent.

It remains likely that land reform activists will continue to campaign for a more radical absolute agricultural right to buy and while part 10 of the LR(S)A 2016 does significantly shift the balance of power towards tenant farmers, calls for transformative measures will undoubtedly remain.[300] However, it is not possible to speculate further within the confines of this thesis as to what these future reforms will entail.

2.3.9 CHAPTER ONE CONCLUSIONS

The legislative reform of land law has its base in historical, economic, and political factors. The Scottish land question helps to underline the complexity of existing title and the problems that an

[296] LRPG, *Recommendations for Action* (n 115) p. 1.

[297] LRRG, *The Land of Scotland and the Common Good* (n 122).

[298] M. Gray, "Revealed: The Duke of Buccleuch and the offshore haven" *The National* (Glasgow 15 March 2016).

[299] Peacock (n 3).

[300] AHLRG (n 204).

inability to convince the populace of the validity of existing title has to the stability of rights to property. The Scottish Executive (and later Government), responded by making the reform of land and property law one of its most important endeavours. The focus of this thesis is on how these reforms have interacted with the right to the peaceful enjoyment of possession in A1P1.

There are several mechanisms under which community and agricultural tenants can acquire land in Scotland. The Scottish Government has instituted four "community" sales procedures. The original community right to buy is pre-emptive and requires a willing seller, the right to buy for sustainable development and the right to buy abandoned and neglected land are conditional on Ministerial approval and do not require a willing seller. The crofting community right to buy applies only to croft land and ancillary rights. The agricultural tenant's right to buy is not an absolute right but requires a willing seller. Since the LR(S)A 2016 removed the requirement of registration, this right applies to all land held under an AH(S)A 1991 tenancies. The right to buy where a landlord is in breach remains a somewhat unknown quantity. The proceeding analysis in this thesis will apply the prevailing human rights discourse, with a focus on A1P1, to the rights to buy.

3 CHAPTER TWO
HUMAN RIGHTS AND PROPERTY LAW

> Human rights, after all, are about the protection of individuals against the state – something of interest perhaps to immigration lawyers, family lawyers, and criminal lawyers. Surely there is not much in this area that is relevant to the property lawyer?[301]
>
> Lord Reed

3.1 INTRODUCTION

It is often said that "human rights" are at the heart of the legislative reform of land law in Scotland.[302] The human rights paradigm, however, encompasses multiple, negative and positive rights-claims or "trumps".[303] For centuries, lawyers and philosophers have debated which rights should be considered "human rights". Reconciling these entitlements is a task fraught with difficulty. It is time to reconsider the vexed question of what "rights" and whose "rights" are really at the core of land reform. Land law reform is acting as a catalyst to the broadening of the human rights discourse in Scotland. While the focus of this thesis is A1P1, the ECHR cannot be considered in isolation, as multiple rights have been declared relevant to ministerial and judicial discretion. It must be asked what role these "new" rights and instruments have and if they have the potential to alter how A1P1 is interpreted. The question to be answered in the second part of this chapter is therefore not the broad question of the role of all relevant non-convention rights, but instead what potential effects will these rights have on the application and effect of A1P1. In 2002, the then Convenor of the Scottish Justice Committee stated that "we are changing the nature of property rights in Scotland".[304] It has to be considered whether the Scottish Ministers have the devolved competencies to do this and whether such a move would be desirable, or even possible.

Part 1 will set out the application and effect of A1P1 in Scots law since the enactment of the HRA. It will be noted that the Scottish Parliament is required to legislate in a manner that is compatible with the ECHR and the jurisprudence of the ECtHR. Courts and Tribunals are public authorities within the meaning of the HRA. As such, the Scottish judiciary is required to operate in a manner

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[301] R. Reed, "Under the Microscope – Human Rights and Property Law" (2001) 2 *Human Rights & UK Practice*, 2.

[302] Shields (n 4).

[303] Dworkin, *Taking Rights Seriously* (n 55).

[304] SP, OR, J, 23 January 2002, col. 946.

that is compatible with Convention rights.

Part 2 considers the questions of what the Scottish Government has termed "relevant non-convention rights".[305] The next stage, in this shift in the human rights paradigm, has seen the Scottish Parliament come to consider whether socio-economic rights—such as the right to participate in cultural life,[306] to an adequate standard of living,[307] education[308] and social security—should also be considered deserving of the special epithet and resulting legal protection given to "human rights"[309]. Part 2 of this chapter will posit that the Scottish Government's inclusion of the ICESCR while being within their devolved competencies, will not incorporate enforceable legal rights. The ICESCR reiterates existing obligations on the Scottish Ministers to progressively realise socio-economic rights. The domestic application of socio-economic rights is subject to several significant challenges; these, however, are not insurmountable, but whether socio-economic rights are more than rhetorical tools and (or) policy goals remains disputed.

This raises critical questions as to the role of the judiciary, who have traditionally been deferential to questions of socio-economic policy.[310] In addition, the widening of the human rights discourse in Scotland will influence litigators who have conventionally been wary of using arguments based on socio-economic rights. However, the ICESCR may affect the role of the Scottish Ministers when considering their human rights and socio-economic duties under contemporary distributive land reform legislation.[311]

Part 3 will consider, and then dismiss, claims of existing native title in Scotland. It will be argued that the arguments forwarded in favour of native title do not stand up to reasoned criticism, nor do they take account of contemporary conceptions of Scots property law.

3.2 PART 1: THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In May 1948 delegates met in The Hague and established what has since become known as the

[305] Shields (n 4).

[306] ICESCR, 16 December 1966, A/RES/2200A/XXI [herein after, ICESCR] Article 15.

[307] Ibid 11.

[308] Ibid 13 and 14.

[309] Ibid 9.

[310] A Pillay, "Economic and social rights adjudication: developing principles of judicial restraint in South Africa and the United Kingdom" (2013) *Public Law* 599, 602.

[311] Scottish Government, *The Socio-Economic Duty: A Consultation* (Edinburgh: The Stationary Office 2017).

European Movement. The creation of the Council of Europe was intended to achieve "a greater unity between its members to safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".[312] Article 3 bound members to "accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms".[313] To achieve its stated purpose, the Council felt that these ideals had to be sustained by law.[314]

The ECHR was signed on 4 November 1950 and ratified by the UK on 8 March 1951, entering force on 3 September 1953. The ECHR is a treaty made between Member States of the Council of Europe, by which the High Contracting Parties undertake to "secure to everyone within their jurisdiction the rights and freedoms" of the Convention.[315] The treaty created the European Court of Human Rights (ECtHR/Strasbourg Court) "to ensure the observance of the engagement undertaken by the High Contracting Parties".[316] The ECtHR has jurisdiction to decide "all matters concerning the interpretation and application of the Convention".[317] Parties undertake "to abide by the final judgment of the ECtHR in any case to which they are parties".[318] The ECHR is an international treaty, and the ECtHR is an international court with jurisdiction under international law to interpret and apply it.[319]

Despite the strong British influence during the drafting of the Convention, the British Government was determined to avoid the possibility of individual petition or the compulsory jurisdiction of the ECtHR.[320] This changed on 14 January 1966, when the UK accepted the competence of the ECtHR to receive petitions.[321] Prior to the HRA's coming into force, the ECHR

[312] Statute of the Council of Europe, European Treaty Series – Nos 1/6/7/8/11, Article 1.a.

[313] Ibid Article 3.

[314] T. Bingham, *The Rule of Law* (London: Penguin 2010) p. 83.

[315] ECHR.

[316] Ibid Article 19.

[317] Ibid Article 32.

[318] Ibid Article 46.

[319] Murdoch and Reed (n 62) p. 1.

[320] G. Marston, "The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950" (1993) 43 *International and Comparative Law Quarterly,* 819-820.

[321] Cmnd. 2894. Treaty Series No. 8 (1966).

had only limited effect in Scots law, but there had developed a presumption in favour of interpreting domestic statutory law in a way that was compatible with the ECHR.[322]

3.2.1 HUMAN RIGHTS ACT 1998

Calls for legislation to guarantee the rights contained in the ECHR in domestic law had been sporadically voiced in various corners.[323] It was New Labour's election in 1997 that brought the real possibility of reform. Straw MP and Boateng MP wrote prior to the passing of the HRA that it would be a significant step away from socialism and towards a liberal constitution.[324] The Labour Party published "Bringing Rights Home" and later in October 1997, "Rights Brought Home: The Human Rights Bill".[325] The white paper noted a fear that: "The rights, originally developed with major help from the UK Government, are no longer actually seen as British rights. And enforcing them takes too long and costs too much".[326] The primary aim appears to have been to give direct effect to the ECHR, allowing access to enforce rights at a domestic level without having to take the long, hard, and prohibitively expensive road to Strasbourg.[327] The white paper also referred to the desirability of British judges being "enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe".[328] This appears to place a responsibility on domestic courts to interpret and apply the ECHR and the jurisprudence of the ECtHR in a "British" sense.[329] The Government argued that the HRA would "mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the UK and their interpretation will thus be far more subtly and powerfully woven into our law".[330] The aim was "to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home".[331]

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[322] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976.

[323] A. Lester, *Democracy and Individual Rights* (London: Fabian Society, 1969) p. 13; L. Scarman, *The Hamlyn Lectures: English Law – The New Dimension* (London: Stevens & Son Ltd 1974) p. 18.

[324] J. Straw and P. Boateng, "Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK law" (1997) 1 *European Human Rights Law Review* 71.

[325] White Paper, *Rights Brought Home: The Human Rights Bill* Cm 3782 (London: The Stationary Office 1997).

[326] Ibid para 1.14.

[327] Ibid.

[328] Ibid.

[329] Ibid para.1.14.

[330] Ibid para 1.14.

[331] Ibid para 1.19.

The HRA received Royal Assent on 9 November 1998 with much of the Act coming into force on 2 October 2000.[332] The HRA does not incorporate the substantive rights in the ECHR into domestic law; instead, it creates "Convention rights" as a counterpart of the rights guaranteed under international law by the ECHR.[333] These mirror the English language text of Article 2 to 12 and 14 of the ECHR; Articles 1 to 3 of Protocol No. 1., and Article 1 of Protocol No. 13, as read with Articles 16 and 18 of the Convention.[334] The fact that English is but one of the authentic languages of the Convention was conveniently ignored, the other after all is French… *quelle horreur*! As Lord Nicholls observed in *Re McKerr*:

> These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the [HRA], and they continue to exist. They are not as such part of this country's laws because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the [HRA]. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the [HRA], depends upon the proper interpretation of that [HRA]…[335]

It is essential not to forget the distinction between the obligations which the UK accepted by accession to the ECHR, and the duties under domestic law which were imposed upon public authorities in the UK by the HRA.[336]

3.3 INTERPRETATIVE OBLIGATIONS

The HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.[337] The Scottish Parliament and the Scottish Ministers are "public authorities".[338] In addition to the HRA, the SA 1998 (as amended by the Scotland Act 2012), provides that a

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[332] HRA s. 1.

[333] Murdoch and Reed (n 62) p. 1.

[334] HRA s 1(1).

[335] *Re McKerr* (n 63) [25].

[336] Murdoch and Reed (n 62) p. 3.

[337] HRAs. 6.

[338] Ibid s. 6.

provision of an Act of the Scottish Parliament is not law so far as it is incompatible with any of the Convention rights,[339] and that a member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention Rights.[340]

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the ECtHR.[341] This has become known as the "mirror principle". Domestic courts are required not, without strong reason, to dilute or weaken the effect of the Strasbourg case law.[342] While the HRA states that domestic courts must "take into account" the jurisprudence of the ECtHR, this is not an unqualified principle. The domestic courts should view their role in interpreting the ECHR as a "constructive collaboration" in which the ECtHR may be the "ultimate authority when it comes to defining the ECHR, but this does not make it impervious to the practical realities of domestic interpretation".[343]

The HRA section 3(1) states that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".[344] Section 3 is "not an optional canon of construction. Nor is its use dependent on the existence of ambiguity".[345] This does not require compatibility to be established at all costs; it is a "strong canon of construction", not a "supplanting mechanism".[346] The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves: no more, but certainly no less.[347] The use of "possible" signifies the idea that there is a "Rubicon" which may not be crossed.[348] The intention was to balance the importance of protecting the rights contained in the Convention with the key constitutional principle of Parliamentary sovereignty.[349]

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339 SA 1998 s. 29.

340 Ibid s. 57.

341 HRA s. 2.

342 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20].

343 S. Pattison "The Human Rights Act and the doctrine of precedent" (2015) 35 *Legal Studies* 142, 156.

344 HRA s. 3(1).

345 *Re S (FC)* [2002] UKHL 10, [2002] 2 AC 291 [37].

346 *R (Wooder) v Feggetter* [2002] EWCA Civ 554, [2003] QB 219 [48].

347 *Ullah* (n 342) [20].

348 *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [49].

349 *Pinnock* (n 66) [48].

3.3.1 ACTS OF PUBLIC AUTHORITIES AND VERTICAL EFFECT

A "public authority" includes "a court or tribunal, and any person certain of whose functions are functions of a public nature but does not include either Houses of Parliament or a person exercising functions in connection with proceedings in Parliament".[350] Where a breach is established the court may grant "just and appropriate" remedies which potentially include damages or a declaration that the act was unlawful.[351] Section 6 is particularly important in Scotland, as it extends the application of the Convention beyond that resulting from the SA 1998 to other public authorities.[352] The definition of a "public authority" remains opaque as the term "public function" is undefined. As a result, what is meant by "public authority", has been subject to controversy and debate.[353]

3.3.2 PUBLIC AUTHORITY

Public authorities can be divided between "core" and "hybrid". Core public authorities are subject to the ECHR in respect of the entirety of their activities.[354] Core public authorities include "courts or tribunals" but also quasi-public bodies such as the Environment Agency.[355] A "hybrid" public authority is a private body that, according to section 6(3)(b) of the HRA, performs "functions of a public nature".[356] Such an authority is required to act in a manner that is compatible with Convention rights when discharging a function of a public nature. This requirement does not extend to instances where such authority is performing a wholly private function.[357]

While this issue has not arisen at the time of writing this thesis, it is likely that disputes may arise as to whether the community bodies and crofting community bodies, discussed in part 2 of chapter one, constitute hybrid public bodies. For example, a community body for a community right to

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[350] HRA s. 6(3).

[351] Ibid s. 8.

[352] *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [7] and [12].

[353] K. Gledhill, "The public function test: have we been asking the right questions" (2015) 20 *Judicial Review* 73.

[354] A. Williams, "Strasbourg's public-private divide and the British Bill of Rights" (2015) 6 *European Human Rights Law Review* 617 621.

[355] Ibid.

[356] HRAs. 6(3)(b).

[357] HRA s. 6(6).

buy is a company limited by guarantee.[358] Community bodies under the right to buy to further sustainable development are required to undertake their functions in a manner that benefits society, as defined by the Co-operatives and Community Benefit Societies Act 2014.[359] It is clear that a private company can be amenable to judicial review, and review under the HRA.[360] The question is whether such a company is a "hybrid" public authority that, performs "functions of a public nature".[361]

Guidance was given in *YL v Birmingham City Council* when the House of Lords considered whether a company which ran a private care home, providing accommodation pursuant to arrangements made with a local authority, constituted a public authority and was performing "functions of a public nature".[362] By a slim majority (Baroness Hale and Lord Bingham dissenting) the Appellate Committee held that that the private company did not constitute a public body. The majority was not convinced by the significance if public funding, although weight was given to the statutory powers conferred as was the existence of a regulatory regime. However, the majority stressed that the fact that the task undertaken by the private company could have been undertaken by the state was not necessarily indicative of the company performing functions of a public nature.[363] Despite this, there remains "no single test of universal application" to determine whether a body is a public body.[364] The courts have adopted a "factor-based approach".[365] Lord Collins and Elias LJ in the Court of Appeal decision of *R (Weaver) v London and Quadrant Housing Trust* set out four "key considerations" when considering a housing trust.[366]

1. The Trust received significant capital payments from public funds to provide subsidised social housing.[367]
2. The Trust worked in close harmony with local government and helped to fulfil the latter's statutory obligations, in particular through allocation agreements which circumscribe the

[358] LR(S)A 2003 s. 34.

[359] LR(S)A 2016 s. 49(11).

[360] *Hampshire County Council v Graham Beer* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

[361] HRA s. 6(3)(b).

[362] *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 AC 95.

[363] Ibid at [110].

[364] *Aston Cantlow* (n 352).

[365] *Secretary of State for Constitutional Affairs Intervening* [2007] UKHL 27, [2008] 1 AC 95.

[366] *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363 (HL).

[367] Ibid [12], [68], [101].

freedom of the Trust to allocate properties. This was not merely a result of choice but of the statutory duty to co-operate.[368]

3. The provision of subsidised housing, as opposed to the mere provision of housing itself, is a function that can be described as governmental.[369]
4. The Trust was subject to regulations designed to further the objectives of government policy in the provision of subsidised housing. The regulations over matters such as rent and eviction were designed to protect vulnerable members of society.[370]

Lord Nicholls, in *Aston Cantlow*, observed that the factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities or is providing a public service.[371] The question is really whether community and crofting community bodies are "standing in the shoes" of a public body.[372]

The first part, of Lord Collins and Elias LJ four-part test, appears to be satisfied as the vast majority of community bodies were only able to purchase the land owned by the body due to large government subsidies, primarily through the Scottish Land Fund.[373] Part two may be satisfied by the reality that a body is not a community body unless Ministers have given it written confirmation that they are satisfied that the main purpose of the body is consistent with furthering the achievements of sustainable development.[374] Part three and the provision of subsidised housing will be satisfied in case-specific circumstances. For example: in 2017 the Pairc Trust in Lewis (which is a community body under the LR(S)A 2003) received £50,621 to purchase a former elderly care unit to renovate it to provide an affordable family home for rent.[375] In such instances, it is apparent that community bodies are taking on the functions of a local authority in providing affordable housing. The fourth part of the test is also most likely satisfied as the community bodies

368 Ibid [69], [101].

369 Ibid [70].

370 Ibid [71], [101].

371 *Aston Cantlow* (n 352) [11].

372 *Graham Beer* (n 360) [37].

373 Big Lottery Fund, "Scottish Land Fund" <https://www.biglotteryfund.org.uk/funding/programmes/scottish-land-fund> [accessed 1 June 2018].

374 LR(S)A 2003 s. 34(1B)(4).

375 Highlands and Islands Enterprise, "Pairc Trust to take forward affordable housing plans" (Highland and Island Enterprise: 11 January 2017) <http://news.hie.co.uk/all-news/pairc-trust-to-take-forward-affordable-housing-plans/> [accessed 1 June 2018].

are incorporated to "further the objectives of government policy", namely the wider programme of land reform and "sustainable development".

It is difficult to determine whether community bodies and crofting community bodies constitute hybrid public authorities as generalisation in this regard are difficult to make. However, it remains that community bodies could potentially be subject to judicial review and be directly subject to the HRA. This has the potential to have significant consequences for how community bodies conduct their affairs. For example: in instances where community bodies seek to evict tenants the courts may be required to undertake a proportionality assessment under Article 8 of the ECHR. However, only with judicial comment on whether community bodies are indeed hybrid public authorities will clarity be given.

3.3.2.1 REMEDIES

The judicial remedies available are set out in section 8 HRA. These are available in respect of any act, or proposed act, of a public authority which the court finds, is, or would be, unlawful. The court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.[376] Damages are limited to competent courts and are only available in civil proceedings.[377] Damages are only to be paid where the "court is satisfied that the award is necessary to afford just satisfaction".[378] In practice this is rare.

3.4 SCOTLAND ACT 1998

The contrasting approaches of the SA 1998 and the HRA add another level of complexity when considering Convention rights. It remains a keystone principle of domestic law that the judiciary does not have the power to set aside legislation. While courts may consider arguments on the correct interpretation of an Act of the Westminster Parliament, it cannot consider the question of whether it should be on the Statute Book at all.[379] This principle is not applicable to Acts of the Scottish Parliament, as the courts have the power to strike down legislation where it infringes the legislative competencies of Holyrood. Section 29 of the SA 1998 outlines that an Act of the

[376] HRA s. 8(1).

[377] Ibid s. 8(2).

[378] Ibid s. 8(3).

[379] *British Railways Board v Pickin* [1974] AC 765 (HL) [789].

Scottish Parliament "is not law so far as any provision of the Act is outside the legislative competence of the Parliament".[380] The effect of section 29(1) of the SA 1998 "is that the Scottish Ministers have no power to exercise functions that may be conferred on them which are outside the legislative competence".[381] Section 57(2) provides that a member of the Scottish Parliament has "no power" to make subordinate legislation or do any other act that is incompatible with the Convention.[382] Therefore, "a proper understanding of the SA 1998 is its concentration on the limits of devolved competence".[383] Thus, while domestic courts cannot invalidate Acts of the Westminster parliament, they can invalidate acts of the Scottish Parliament. This gives the Court of Session and the High Court of Justiciary significantly more power than their English counterparts, who are, under section 4 HRA, only able to make a declaration of incompatibility that does not affect continuing validity.[384]

Under the SA 1998, "Convention rights" has the same meaning as in the HRA.[385] Whether a provision of an Act of the Scottish Parliament is within its competencies is a "devolution issue".[386] Section 100 of the SA 1998 states that to bring a claim a person must be a victim for the purposes of Article 34 of the Convention (within the meaning of the HRA) if proceedings in respect of the act were brought to the ECtHR.[387] Section 100(3) states that "[t]his Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights, which it could not award if section 8(3) and (4) of the HRA applied".[388]

The Supreme Court, in *Salvesen v Riddell,* observed that "as we are concerned in this case with an issue about compatibility with a Convention right, the proper starting point is to construe the legislation as required by section 3 of the HRA".[389] The obligation to construe a provision in an Act of the Scottish Parliament consistently with Convention rights so far as it is possible to do so is a strong one, and the court must prefer compatibility to incompatibility.[390] Courts are expected

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380 SA 1998 s. 29.

381 *Somerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2738 [13].

382 SA 1998 s. 57(2).

383 *Somerville* (n 381) [14].

384 HRA s. 4.

385 SA 1998 s. 126(1).

386 Ibid Schedule 6, para 1(a).

387 Ibid s. 100.

388 Ibid s. 100(3).

389 *Salvesen* (UKSC) (n 11) [46].

390 *DS v HM Advocate* [2007] UKPC D1, 2007 SC (PC) 1 [24].

to go with the grain of the legislation, as it is not for the court to go against the underlying thrust of what it provides for, as to do this would be to trespass on the province of the legislature.[391]

Under section 102 of the SA 1998, when a court or tribunal finds that an act of the Scottish Parliament is outwith its legislative competence, the court or tribunal may make an order, removing or limiting any retrospective effect of the decision, or suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.[392] Since the enactment of the HRA and SA 1998, only three have been struck down as being beyond the competence of the Scottish Parliament.[393]

3.4.1 CONCLUSIONS ON THE APPLICATION OF CONVENTION RIGHTS

The HRA has resulted in four important changes to domestic law. First, it requires public authorities, including the courts, to act in a manner that is compatible with Convention rights. Second, it requires the courts to interpret legislation so far as is possible in a manner that is compliant with the Convention. Third, it requires the jurisprudence of the Strasbourg Court to be taken into account by domestic courts when deciding a question on Convention rights. Fourth, it empowers the court to award damages where Convention rights have been violated.

3.5 CONVENTION RIGHTS OTHER THAN A1P1

Before proceeding it is important to illustrate that the effect of the Convention and its Protocols on land law is not simply confined to A1P1. Article 8 of the ECHR provides a right to respect for one's private life, family, home and correspondence.[394] This is one of the broadest Convention rights, containing both positive and negative obligations.[395] Article 8 is limited when the right is exercised "in accordance with the law and is necessary in a democratic society".[396] To be justifiable measures must respond to a "pressing social need" and be proportionate.[397] The doctrine of the margin of appreciation, and domestically the weight given to the decisions of democratic

391 *Ghaidan* (n 348) [121].

392 SA 1998 s. 102(2)(a) and (b).

393 *Salvesen* (UKSC) (n 11); *Cameron* (n 276); *Christian Institute v Scottish Ministers* [2016] UKSC 51.

394 ECHR Article 8.

395 *Y v Netherlands* (1985) 8 EHRR 235.

396 Article 8(2); *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

397 *Sunday Times* (n 396).

institutions, have been significant in relation to the operation of Article 8. While the margin or weight given, will be determined by the particular facts at issue, in Article 8 cases it appears to be narrower than is observable in relation to A1P1.[398] In many instances, applications are made under a combination of articles.[399] For example, The Grand Chamber in *Akdivar v Turkey* considered the application of Turkish nationals who alleged that the attack on the village of Kelekçi by Turkish security forces in 1992 violated Articles 3, 5, 6, 13, 14, 18, and 25(1), of the Convention and A1P1.[400]

Conceptions of the "home" have been described as the "headquarters of private life", the "*letzte Bastion der Privatsphäre*" and a "*rempart de l'intimité*".[401] The ECtHR has interpreted the concept broadly as "the physically defined area, where private and family life develops".[402] Home in such instances is defined in a broader sense than the traditional Scots law conceptions of a "dwelling-house".[403] The ECtHR has extended the definition of "home" to instances of the registered office of a company run by the applicant and has even been held to encompass a lawyer's office.[404] This is not just the right to the actual physical area, but also to the quiet enjoyment of that area. A violation of Article 8 will be found not just in clear physical breaches such as unauthorised entry, but potentially also in serious instances of noise, emissions, smells or other forms of interference.[405] Despite this, it is important to remember that Article 8 (while protecting an important part of human dignity) does not protect a property right or rights to property.[406] As Lord Hope observed in *London Borough of Harrow v Qazi*, "home" is not a legal term of art and Article 8 is not directed to the protection of property interests or contractual rights.[407]

Land lawyers may, in certain instances, also be required to consider Article 6 which protects the right to a fair trial, Article 10 guaranteeing the freedom of expression, Article 11 guaranteeing

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398 *Connors v United Kingdom* (2004) 40 EHRR 189.

399 *Gillow v United Kingdom* (1991) 13 EHRR 593.

400 *Akdivar v Turkey* (1997) 23 EHRR 143.

401 A. Buyse, "Strings attached: the concept of 'home' in the case law of the European Court of Human Rights" (2006) 3 *European Human Rights Law Review* 294, 295.

402 *Giacomelli v Italy* (2007) 45 EHRR 38 [76].

403 Succession (Scotland) Act 1964 s. 8(4).

404 *Chappell v United Kingdom* (1990) 12 EHRR 1[26] and [63]; *Société Colas Est v France* (2004) 39 EHRR 17.

405 *Giacomelli* (n 339) [76].

406 *London Borough of Harrow v Qazi* [2003] UKHL 43 [2004] 1 AC 983.

407 Ibid [8].

freedom of assembly and Article 14 which prohibits discrimination.[408] Article 14 of the ECHR states that the rights contained must be secured without discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".[409] This is restricted to discrimination based on personal attributes or status.[410]

Challenges under A1P1 often come in combination with claims made under other Convention rights. For example, the Court of Session, in *Pairc Crofters Ltd* v *Scottish Ministers,* dismissed a challenge to the CCRtB on the grounds that it violated Article 6 and A1P1.[411] Article 6, 10, 11 and 14 have, however, only generated limited case law and a finite amount of academic comment in direct relation to private law, and land law.[412] As such, when considering the proceeding analysis in this thesis, it is important to remember that the modern land lawyer cannot confine their analysis of the ECHR to A1P1.

3.6 PART 2: RELEVANT NON-CONVENTION RIGHTS

Confidence in the Scottish Government's ability to "radically" alter property rights was shaken by the Supreme Court decision of *Salvesen v Riddell.*[413] In *Salvesen* a provision, relating to an agricultural tenants' pre-emptive right to buy, was held to constitute a disproportionate interference.[414] The Justices of the Supreme Court held that there had been a violation of A1P1 of the ECHR, but suspended the effect of their finding.[415] The response from the Scottish Parliament was swift.[416]

The facts in *Salvesen* were *sui generis* and emanated from a last-minute amendment to the then Agricultural Holdings (Scotland) Bill.[417] The significance of this decision cannot be overestimated as it alerted the Scottish Ministers to the potentially limiting effect of Convention rights on

[408] ECHR Articles 6, 10, 11 and 14.

[409] ECHR Article 14.

[410] *Kjeldsen v Denmark* (1976) 1 EHRR 711.

[411] *Pairc* (n 43).

[412] See D. Hoffmann (ed) *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP 2011).

[413] *Salvesen* (UKSC) (n 11).

[414] Ibid.

[415] Ibid [58].

[416] SP, OR, 25 June 2013, col. 21441.

[417] *Salveson* v *Riddell* [2012] CSIH 26, 2013 SC 69 [7-32]; *McMaster* OH (n 108).

distributive land reform.[418] It is clear from the committee debates surrounding the inclusion of "relevant non-convention rights" into what became the LR(S)A 2016 that it was included primarily as an attempt to limit the "individual rights" of "very powerful individual interests in matters concerning urban and rural land".[419] To one MSP:

> If we fail to recognise those wider rights and are mindful only of, for example, the European Convention on Human Rights, we are promoting—always promoting—the concept of individual rights and never promoting the concept of community rights. It is important, at least at the base of decision making by ministers, that they should be mindful of those wider obligations.[420]

The SLRRS states that "human rights in relation to land include both core civil and political rights and wider economic, social, cultural and environmental rights".[421] The SLRRS asserts that Scotland is committed to implementing international treaties signed and ratified by the UK.[422] The Scottish Ministers have come to refer to the ICESCR in their definition of "other" human rights, in addition to the Voluntary Guidelines on the Governance of Tenure and the United Nations Sustainable Development Goals.[423]

The ICESCR has been added to the Scottish Ministers' conceptions of "relevant non-Convention rights" in the CE(S)A 2015 and the LR(S)A 2016.[424] Additionally, the ICESCR is considered important to the Commission through their Strategic Plan and a discussion paper published in May 2018.[425] Writing in The Scotsman in May 2018, McCall reported that a discussion paper published by the Commission showed that "land reform in Scotland has the potential to further improve human rights across the country".[426] To McCall, this "would mean moving away from a perception that the only human rights dimension of land reform is the right to own property".[427] This is arguably the most significant recent development for socio-economic rights in the UK.

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418 SP, OR, RACCE, 4 November 2015, col. 7; SP, OR, 16 December 2015, col. 69-70.

419 SP, OR, RACCE, 11 March 2014, col. 47.

420 Ibid col. 46-47.

421 Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178) p. 36.

422 Ibid.

423 LR(S)A 2003 s. 98(5A); LR(S)A 2016 s. 56(13) (a); CE(S)A 2015.

424 CE(S)A 2015 s. 144; Schedule 5 8(6)(b)(5A); LR(S)A 2016 s. 1(6)(b); s. 44(11)(b); s. 56(14)(b).

425 SLC, *Making More of Scotland's Land: Out Strategic Plan 2018 to* 2021 (n 233).

426 C. McCall, "Land reform in Scotland 'could boost human rights'" *The Scotsman* (Edinburgh: 8 May 2018).

427 Ibid.

The inclusion of relevant non-convention rights is part of a wider on-going conversation in Scotland in relation to how the nation is governed and a self-asserted, "different approach", towards a "socio-economic duty", for the public sector, and the bringing into force of the "missing" section 1 of the Equality Act 2010, as amended by the Scotland Act 2016.[428]

3.6.1 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The most prominent "relevant non-convention" rights instrument is the ICESCR. The ICESCR was adopted by the United Nations General Assembly in 1966 and entered into force in 1976.[429] The ICESCR was, and remains, the most complete international standard on economic, social and cultural rights.[430] The ICESCR states that its rights are to be achieved through the modest aim of "progressive realisation".[431] The application and interpretation of international human rights instruments in domestic law were for a long time relatively rare, and the ICESCR remains a "misunderstood instrument".[432] It was viewed as having limited force until the establishment of the UN Committee on Economic, Social, and Cultural Rights ("The Committee") in 1985. The ICESCR was given further powers, beyond the reporting procedure, by the passing of the Optional Protocol to the ICESCR, which entered into force on 5 May 2013.[433] However, the UK has not signed or ratified the Optional Protocol, thereby inhibiting individuals and groups from bringing complaints to the Committee.[434]

The Scottish Government has stated that it is committed to giving effect to the terms of the ICESCR and this "requires appropriate steps to be taken towards achieving certain rights to adequate standards of living including adequate food and adequate housing as well as certain rights to work".[435] The Memorandum notes the importance of the ECHR, but also states that the Scottish

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[428] Equality Act 2010 s. 1 and 1(2A); CE(S)A 2015; Education (Scotland) Act 2015; Children and Young People (Scotland) Act 2014; Scottish Government, *The Socio-Economic Duty: A Consultation* (n 250).

[429] General Assembly Res. 2200 (XXI), 22 U.N. GAOR Supp. (No. 16) 49, U.N. Doc A/6316 (1966).

[430] S. Salgado, *Human Right for human Dignity* (London: Amnesty International Publications 2005) p. 8.

[431] ICESCR.

[432] B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford: OUP 2014).

[433] UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008 A/RES/63/117.

[434] Equality and Human Rights Commission "*Socio-economic rights in the UK*" (London: Equality and Human Rights Commission 2015) p. 11.

[435] Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178).

Government is committed to giving effect to the terms of the ICESCR. The memorandum states that the "Ministers aim to ensure that, where possible, the framework of rights and responsibilities over land are designed to help ensure all members of society have access to the resources required to meet their needs".[436]

3.6.2 DEVOLVED COMPETENCE

In relation to the ECHR, the Scottish Ministers cannot alter the effect given to Convention rights, and outside of a few minor exceptions, they do not have the power to amend the SA 1998.[437] The Scottish Parliament cannot modify "protected enactments", which includes parts of the HRA.[438]

While the Scottish Ministers cannot alter the application and effect of the HRA and ECHR, the SA 1998 does not reserve "observing and implementing international obligations".[439] Thus, while the Scottish Ministers' cannot negotiate new treaties, they can undertake the implementation of existing ones. The incorporation of an international treaty into Scots law and not into the legal system of England, Wales, and Northern Ireland is not unprecedented.[440] Therefore, while it is the UK that is the party to the ICESCR, the Scottish Ministers have the devolved competencies to make reference to the ICESCR into Acts of the Scottish Parliament.[441] It must be remembered that the Scottish Parliament remains a body created by statute that derives its powers from statute.[442]

3.6.3 SOCIO-ECONOMIC RIGHTS

The traditional narrative states that socio-economic rights were originally considered "second generation" or "positive" rights. This was because unlike civil and political rights, which in most instances protect the individual against the actions of the state, socio-economic rights often make

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[436] Land Reform (Scotland) Bill (SP Bill 76) [As Introduced 22 June 2015] Policy Memorandum, para. 85-87 and 146-148.

[437] Ibid Sch. 4. para. 1(2)(f); s. 28(7).

[438] SA 1998 s. 29(2)(c); Sch. 4.

[439] SA 1998 Sch. 5 Pt 1 para 7(2)(a).

[440] Adults with Incapacity (Scotland) Act 2000, Sched 3(14); Children and Young Peoples (Scotland) Act 2014 s. 1(1)

[441] Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178).

[442] *Whaley v Lord Watson* 2000 SC 340 (IH) [348].

positive demands.[443] This hierarchy, or "separation wall", remains carved into the international human rights system by the existence of different treaties.[444] There can be little doubt that these divisions are out-dated and insufficiently precise. Notably, the Universal Declaration of Human Rights 1948[445] did not divide rights, and the ECtHR has observed in *Airey v Ireland* that "there is no water-tight division".[446]

Despite this, the debate over the role of socio-economic rights continues, and while academics are often quick to proclaim that the debate over the justiciability of human rights is over, state actions in this area and the judicial enforcement of socio-economic rights remains fraught with difficulties.[447] For many years there remained a widely held belief in the UK that socio-economic rights were adequately protected by employment law, the welfare state and judicial review.[448] The normal criticisms remain that socio-economic rights are too vague, overly expensive, and are outside of the institutional competencies of the judiciary.[449] These questions have been extensively debated over the past decades.[450] However, there remains a lack of familiarity with these questions in Scotland. It is therefore important to discuss these often-cited criticisms and consider whether rights contained in the ICESCR are justiciable.

3.6.4 DEFINITIONAL PROBLEMS

The first criticism often forwarded is that social economic rights are too vague.[451] Socio-economic rights do pose a particular set of problems as the wording often resembles policy documents or a political party's manifesto. While socio-economic rights are often difficult to define this is not a unique problem. In *Osborn*, Lord Reed observed that the guarantees set out in the substantive

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[443] See C. Fabre, "Social Rights in European Constitutions" in G. de Burca and B. de Witte (eds), *Social Rights in Europe* (Oxford: OUP 2005).

[444] I. Cismas, "The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights" in E. Riedel *el al* (ed), *Economic, Social, and Cultural Rights in International Law* (Oxford: OUP 2014) p. 452.

[445] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948 A/RES/217A/III.

[446] *Airey v Ireland* (1979) 2 EHRR 305 [26].

[447] A. Pillay, "Towards effective social and economic rights adjudication" (2012) 10 *International Journal of Constitutional Law* 732.

[448] G. Van Beuren, "Socio-economic rights and a Bill of Rights: an overlooked British tradition" (2013) 10 *Public Law* 821, 822.

[449] E. Palmer, *Judicial Review: Socio-Economic Rights and the Human Rights Act* (Oxford: Hart 2009) p. 107.

[450] See M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: CUP 2012).

[451] E. Wiles, "Aspirational Principles or Enforceable Rights? The Future of Socio-Economic Rights in National Law" (2006) 22 *American University International Law Review* 35.

articles of the ECHR, like other guarantees of human rights in international law, are mostly expressed at a very high level of generality.[452] In truth, socio-economic rights, like much legal discourse, may simply expose the limits of interpreting contested conceptions of language.[453] To be effective and adaptable the majority of human rights instruments are drafted in an "open-textured" manner.[454] As the Constitutional Court of South Africa observed in *South Africa v Grootboom*, socio-economic rights "cannot be said to exist on paper only".[455] Therefore, while socio-economic rights suffer from definitional problems, this is not unique, nor necessarily insurmountable.

3.6.5 INSTITUTIONAL COMPETENCIES

Another common criticism is that socio-economic rights are outside of the institutional competencies of the judiciary.[456] The fear is that "judicial usurpation" will occur and the courts will enforce socio-economic rights in a manner that compromises the decision-making authority of democratic institutions.[457] This is part of a broader apprehension in the UK of judicialising the welfare state, as there remains the firmly embedded belief that public finances are the preserve of democratic institutions and not the judiciary.[458] As Sir Thomas Bingham MR observed in *R v Cambridge Health Authority,* "difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number... That is not a judgment which the court can make".[459]

To some, the complex, often technical knowledge required, means that the judiciary cannot be considered well placed to consider these matters and instead it should be left to the legislature and executive. The argument appears to be that, due to the positive nature of socio-economic rights,

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[452] *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [56].

[453] See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961).

[454] M. Langford, "The Justiciability of Social Rights: From Practice to Theory" in M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: CUP 2012) p. 30.

[455] *South Africa v Grootboom* 2001 (1) SA 46 (CC) 20 (South Africa).

[456] *O'Reilly v Limerick Corp* [1989] ILRM 181 [193-194] (Ireland).

[457] J. Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346.

[458] Palmer (n 449) p. 162.

[459] *R v Cambridge Health Authority* [1995] EWCA Civ 10, [1995] 1 WLR 898, 906.

to do otherwise would allow the judiciary to impose budgetary restraints on democratic institutions.

The boundaries between the "legal" and the "political" are, however, not clear-cut, and judges undeniably make policy choices.[460] For example, the judicial review of administrative decisions often requires the court to make decisions about the allocation of limited resources. As the Supreme Court of Canada observed that "any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money".[461]

The Constitutional Court of South Africa considered these criticisms and noted that even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.[462] A court may require the provision of legal aid or the extension of state benefits to a class of people who formerly were not beneficiaries. To the Constitutional Court "it cannot be said that by including socio-economic rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights it results in a breach of the separation of powers".[463] There is the further criticism that deferring complex questions of socio-economic policy to the judiciary entails giving further powers to a "legal elite" who may not be wholly representative of broader society.

The experience of jurisdictions around the world is that overcoming the question of democratic legitimacy is not insurmountable. Scotland can, with caution, overcome the risk of judicial usurpation and recognise that the rights contained in the ICESCR are not illusory. However, this will require injections of enthusiasm and an open dialogue between the judiciary and Holyrood.

3.6.6 THE COST OF SOCIO-ECONOMIC RIGHTS IN PRACTICE

The third criticism, often used to discredit socio-economic rights, is that they impose mandatory and burdensome financial obligations on the state. This is part of the ideological baggage of the

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460 C. Courtis (ed), *Courts and the Legal Enforcement of Economic, Social and Cultural Rights* (Geneva: International Commission of Jurists 2008) p. 75.

461 *Schachter v Canada* [1992] 2 SCR 679, [709] (Canada).

462 *Certification of the Constitution of the Republic of South Africa* (1996) Case CCT/23/96 (South Africa).

463 Ibid [77].

Cold War, where socio-economic rights were often perceived as "red", or even radical socialist rights.[464]

Accepting that socio-economic rights can be justiciable does not necessarily result in burdensome positive obligations upon the state. Jurisdictions around the world have come to place limits on the realisation of socio-economic rights in practice.[465] The Constitutional Court of South Africa, in *Soobramoney v Minister of Health, KwaZulu-Natal*, considered whether a terminally ill patient whose kidneys had failed had a right to dialysis. The petitioner averred that this was a violation of Section 27(3) of the South African Constitution which states that "no one may be refused emergency medical treatment".[466] The court observed that the obligations are "dependent upon the resources available… and that the corresponding rights themselves are limited by reason of the lack of resources". [467]

Further guidance was given in *South Africa v Grootboom* where the Constitutional Court set the standard of "reasonableness" and held that the obligations on the state are for "the progressive realisation" of socio-economic rights, within the available resources.[468] As such, the South African experience has shown that socio-economic rights do not necessarily impose burdensome financial restraints.[469]

It is important to highlight that under the "reasonableness" standards domestic courts are not left to create public policy, instead, they are armed with the power to review the decisions of democratic bodies if they do not conform to pre-existing standards they have accepted by being party to the ICESCR.

3.6.7 THE INFLUENCE OF THE ICESCR

It is therefore clear that the rights in the ICESCR can be justiciable. The question turns to the existing effect of the ICESCR and socio-economic rights in Scots law. It must be remembered

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[464] G. Van Beuren "Socio-economic rights and a Bill of Rights: an overlooked British tradition" (2013) 10 *Public Law* 821, 821.

[465] See B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford: Oxford University Press, 2014); E. Palmer, *Judicial Review: Socio-Economic Rights and the Human Rights Act* (Oxford: Hart Publishing, 2009.

[466] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (South Africa).

[467] Ibid [11].

[468] *Grootboom* (n 455) [45]-[46].

[469] S. Liebenberg, "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6 *Law Democracy & Development* 159, 189.

that the UK is a dualist state, and as such even international treaties such as the ECHR and ICESCR do not form part of Scots law, although they can be taken into account as an aid to the interpretation of statutes and in the development of the common law.[470] What the HRA has done is to create domestic rights expressed in the same terms as those contained in the ECHR and its Protocols. But they are domestic rights, not international rights.[471] The domestic rights created by the HRA are interpreted by reference to the corresponding rights under the ECHR.[472]

The incorporation of the ICESCR into the domestic law of the UK was considered after the passing of the HRA.[473] This was, in part, inspired by a fear that the ECHR was an "outmoded" treaty and as such protected at best, a very basic minimum standard of living.[474] In 2002, Van Bueren called for the incorporation of the ICESCR, using a framework similar to that provided by the HRA, to represent the next constitutional dynamic in the UK.[475] Van Bueren, reasoned that "it is time to move to a new principled, fully democratic, constitutional settlement".[476] However, this has not happened, and legislation implementing the ICESCR at Westminster remains unlikely. While demonstrating that there was considerable support in the UK for socio-economic rights the Joint Committee on Human Rights was only willing to conclude that "further attention" was required.[477]

The reference to the ICESCR in several Acts of the Scottish Parliament does not make the ICESCR directly enforceable in an equivalent manner to the HRA. As Murdoch and Reed note "the significance of other international instruments concerned with human rights is generally less than that of the ECHR".[478] The ICESCR has not been implemented by domestic legislation. This limits its ability to be enforceable in Scots law although it will remain relevant as an aid to statutory interpretation.[479]

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[470] Murdoch and Reed (n 62) p. 1.

[471] *Re McKerr* (n 63) [65].

[472] *S and Marper* (n 64) [66].

[473] E. Metcalfe, "Justice Response to the *'Inquiry into the Concluding Observations of the UN Committee on Economic Social and Cultural Rights*" (E/C.12/1/Add.79) JHCR, www.justiice.org (2003) para 17.

[474] K. Ewing, "Constitutional Reform and Human Rights: Unfinished Business" (2001) *Edinburgh Law Review* 297.

[475] Van Beuren (n 464).

[476] Ibid 472.

[477] Joint Committee on Human Rights, *A Bill of Rights for the UK*? HL 165-1, HC 150-I (London: The Stationary Office 2008) p. 45.

[478] Murdoch and Reed (n 62) p. 4.

[479] Ibid p. 4.

A great deal of literature and judicial comment exists regarding the effect of international treaties that have not been implemented by domestic legislation in relation to the ECHR prior to the enactment of the HRA. For a long time, the Scottish judiciary were apprehensive when considering the domestic effect of unincorporated treaties.[480] In the Inner House case of *Hagan v Lord Advocate*, the applicants averred that a ban on hunting with wild dogs was contrary to their ICESCR rights for everyone to take part in cultural life.[481] To Lord Brodie, the rights in the ICESCR were "not intended to give rise to a legal right, enforceable against a national government".[482]

There remains limited domestic treatment of the ICESCR. Addressing the House of Lords in 1996, Lord Bingham outlined that it was "common sense" that courts should ordinarily assume that statutes are intended to be compliant with the then unincorporated human rights treaties.[483] Lord Bingham later observed in *R v Lyons* that prior to direct incorporation the ECHR exercised a "persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretion, bearing on the development of the common law".[484]

Whether human rights treaties should automatically be given effect in dualist states, has been subject to significant judicial and academic debate.[485] To Brudner, "since international conventions on human rights belong to the category of conventions articulating principles rationally connected to the common good of the international community, they stand in no more need of transformation than do rules of international custom".[486] To others, it is Parliament's acquiescence to the ratification of treaties that allows the courts to give the effect, even without direct legislation.[487]

There is a strong presumption in favour of interpreting domestic statutory law in a way which does

[480] *Kaur v Lord Advocate* 1980 SC 319 (OH) [328].

[481] *Whaley v Lord Advocate* 2004 SC 78 (OH) [33].

[482] Ibid [33].

[483] H.L. Deb 3 July 1996, vol. 575 col. 1465-1467.

[484] *Lyons* (n 322) [13].

[485] L. Brilmater, "From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements" (2006) 77 *British Yearbook International Law* 163, 165.

[486] A. Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985) 35 *University of Toronto Law Journal* 219, 231.

[487] B. Malkani, "Human rights treaties in the English legal system" (2011) 6 *Public Law* 554, 555.

not place a member state in breach of its international obligations.[488] As such, where Scots law is incomplete or uncertain, it is for domestic courts to interpret the law in a manner that is compliant with international treaties.[489] While the domestic jurisprudence does not appear to show a complete willingness to infringe the constitutional and democratic principle of dualism, there remains a strong interpretative presumption in favour of interpreting domestic law in a manner that is compatible with international human rights treaties.[490] It follows that while the normal canons of construction would hold that the Westminster Parliament has already intervened to strike the relevant balance, it is not generally permissible for the domestic courts to develop the common law in a manner that is contrary to international human rights treaties.[491] Therefore, the ICESCR should be seen as exercising a pervasive influence on Scots law and not just when the Scottish Ministers exercise their discretion under the CE(S)A 2015 and the LR(S)A 2016.

3.6.8 CAN DOMESTIC LAW BE INHERENTLY LIMITED BY SOCIO-ECONOMIC RIGHTS?

The question is therefore what role can the ICESCR play in resolving apparent inadequacies in domestic law. While socio-economic rights may be justiciable, the Scottish Ministers' inclusion of the ICESCR into its definition of "other rights" does not constitute an implementation by domestic legislation. Further, the ICESCR will have limited effect due to the inherent limitation problem. The "problem" is really a question of "engaging" human rights. Domestic law becomes "inherently limited" when it becomes subservient to international human rights law.

The difficulty is finding a situation in which the rights in the ICESCR could be engaged but are not already protected in some form by existing principles of Scots law. In many instances, this involves the judiciary interpreting what some would call civil and political rights in a manner that appears to protect socio-economic rights. More often it involves administrative law and the rule of law. This means that in practice those who allege a breach of their socio-economic rights will not grasp the ICESCR but instead will still be required to turn to the domestic law to find a remedy.

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488 *Lyons* (n 322).

489 *Derbyshire County Council v Times Newspapers Ltd.* [1992] 1 QB 770 (CA).

490 *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1149.

491 *R v Chief Constable of the Royal Ulster Constabulary Ex p. Begley* [1971] 1 WLR 1475, 1480 (CA).

3.6.9 DYNAMIC INTERPRETATIONS

While the ECtHR has a limited capacity to consider socio-economic rights directly, the broader dynamic interpretation of the rights contained in the ECHR has evolved in a manner that often protects socio-economic rights.[492] As Collins notes "the ECtHR promotes an integrated approach by which the meaning of the rights protected by the ECHR should be compatible with other international conventions".[493]

The ECtHR has also held that forced displacement and the destruction of the home (which includes the rights of tenants, unsecure tenants, and even squatters) violates A1P1.[494] The ECtHR has even held that poor housing that results in an unhealthy environment is not compatible with A1P1.[495] Article 8 does not confer a right to "a home" in the abstract. It protects an individual's relationship with the property which they have sufficient links to that we might call it their home. Unlike A1P1, Article 8 is targeted, but does not require the claimant to have a property right.[496]

Contrary to the traditional conceptions of "first generation" rights, Article 8 has come to impose positive obligations on contracting states. In certain instances, the ECtHR has held that this extends to an obligation to protect the right to a private life from interference by another private person or entity.[497] However, when it comes to safeguarding socio-economic rights, the dynamic interpretation of Convention rights can only go so far. In *Chapman v United Kingdom*, the ECtHR observed that:

> It is important to recall that Article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many

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[492] *Airey* (n 446) [26].

[493] H. Collins, "On the (In)compatibility of Human Rights Discourse and Private Law" (2012) LSE Law, Society and Economy Working Paper 7/2012, 10 <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2012-07-Collins.pdf> [accessed 1 June 2018].

[494] *Oneryildiz v Turkey* (2004) 39 EHRR 12.

[495] *López Ostra v Spain*, (1995) 20 EHRR 277 [56-58].

[496] Ibid [8].

[497] *X & Y v Netherlands* (1985) 8 EHRR 235 [23].

> persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.[498]

On a practical level, housing poses a particular set of challenges to which human rights law and policy work are currently limited in their ability to respond.[499] Therefore, while Convention rights have in many instances protected what can be described as "socio-economic rights" the effectiveness of this process is subject to dispute as it leaves contracting states with a wide margin of discretion to carry out their functions as they see fit.

3.6.10 THE LIMITS OF SOCIO-ECONOMIC RIGHTS IN PRACTICE

The inclusion of socio-economic rights is far from straightforward. In the UK as a whole, the problems have become apparent in relation to immigration and austerity.[500] This came to a head in 2015 when, by a majority of 3:2, the Supreme Court held that the Secretary of State for Work and Pensions had failed to take into account the interests of children when implementing the household benefit cap.[501] In 2016, the UN Committee on Economic Social and Cultural Rights expressed "serious concerns" about the UK Government's programme of austerity under the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016.[502]

It is important for the Scottish Government to appreciate that referencing non-convention rights such as the ICESCR in Acts of the Scottish Parliament will not result in a panacea. Indeed, the evidence from various jurisdictions around the world show that effectively enforcing socio-economic rights can be problematic. Surveying the available South American studies, Bergallo concludes that "in some instances, judicialization has fostered dialogue and inter-branch cooperation, in other instances regressive effects may be surpassing the benefits of allowing courts a role in the enforcement of social rights".[503]

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498 *Chapman v United Kingdom* (2001) 33 EHRR 18 [99].

499 C. Albisa, B. Scott, and K. Tissington, "Demolishing Housing Rights in the Name of Market Fundamentalism" in L. Minkler (ed) *The State of Economic and Social Human Rights* (Cambridge: CUP 2013) p. 86.

500 *JS* (n 490).

501 Ibid.

502 Economic and Social Council "Concluding observations on the sixth periodic report on the United Kingdom of Great Britain and Northern Ireland" UN Doc E/C.12/GB/CO/06 (14 July 2016) [40].

503 P. Bergallo, "Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina" (2011) 89 *Texas Law Review* 1611, 1613.

Discussing socio-economic rights in public, far less actual meaningful reform, risks a political and media backlash. The politically conservative, and certain parts of the media are quick to seize on socio-economic rights as allowing for a "scrounger's charter".[504] This is not distinct to the ICESCR. The protection of socio-economic rights within this existing human rights paradigm has often resulted in criticism. For example, in 2004 Lord Bonomy in the Outer House was asked to consider the judicial review of a prisoner on remand who argued that the decision to continue to detain him without proper toilet facilities and his resultant eczema and psychological trauma amounted to a violation of Article 3 and Article 8 of the ECHR.[505] The resulting "slopping-out" cases have resulted in criticism from certain parts of the media.[506]

A further limit, on the effectiveness of socio-economic rights, remains the question of equality of arms and the cost of litigation. Adapting an old cliché: justice in Scotland is open to everyone, just like the publicly owned Old Golf Course in St. Andrews at £180 per round in high season. There is considerable evidence from South America that socio-economic rights have been used by those with the existing socio-economic capital to utilise the existing legal system.[507] The position in South Africa differs where some of the most important cases have involved the most vulnerable in South African society.[508] Generalisations in this regard are difficult to make. The point to remember is that parchment guarantees will not result in effective remedies for the most vulnerable in Scottish society if the legal system does not offer an adequate and affordable system of redress.

3.7 OTHER RELEVANT NON-CONVENTION RIGHTS

The LR(S)A 2016 requires the Scottish Ministers to have regard to the desirability of promoting respect for such internationally accepted principles and standards for responsible practices in relation to land as the Scottish Ministers consider to be relevant. This is to include the terms of international principles, the Scottish Government believes that UN Voluntary Guidelines on the

[504] P. Hennessy, "Labour's 'secret plan' to make claiming benefits a human right" *The Telegraph* (London: 13 July 2013); L. McKinstry, "Human Rights Act has become a Villain's Charter" *Daily Express* (London: 3 October 2011).

[505] *Napier v Scottish Ministers* [2005] 1 SC 229 (OH) [76].

[506] "Slopping-out Prisoners 'to sue for £100m'" *The Scotsman* (Edinburgh: 11 February 2005).

[507] D. Brinks and W. Forbath, "Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospect for Pro-Poor Interventions (2011) 89 *Texas Law Review* 1943, 1946.

[508] For example, *South Africa v Modderklip Boerdery (Pty) Ltd* 40 2005 (5) SA 3 (CC) (South Africa) concerned the occupation of a farm near Johannesburg by homeless squatters.

Responsible Governance of Tenure (VGGTs); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the SDGs, are relevant.[509]

While the main focus of the debate over relevant non-convention rights has been on the ICESCR, the Scottish Ministers have stated that land reform entails more than the rights contained in the ECHR, and indeed the ICESCR.[510] It is not possible within the confines of this thesis to consider the other non-convention rights in detail. It is, however, important to briefly outline how these rights affect the principles that may be considered by the Scottish Ministers when exercising their discretion under the various rights to buy.

The SLRRS notes that Article 14 of the CEDAW makes specific reference to ending discrimination against women in rural areas. The SLRRS states that "the Scottish Government took the view that Article 14 of CEDAW is important for the purposes of promotion via the Statement because of the need to ensure that women play a full social and economic role in rural life, and benefit from any government supported rural programmes".[511]

The Scottish Ministers have placed importance upon the SDGs. These goals are an international agreement, that came into effect in January 2016. There are 17 SDGs (or "Global Goals" as they are popularly known) and 169 targets. The signatories commit to tackle issues as diverse and deep-rooted as gender inequality, climate change, access to quality education and the promotion of peaceful and inclusive societies.[512] The SHRC has asserted that the SDGs should "inform the present debate on land reform in Scotland as they identify land as a key element for the post-2015 development agenda".[513] The SGDs are not legal obligations and do not impose interpretative requirements upon the Scottish Ministers or judiciary. As such, their importance will remain largely confined to public policy and the rhetoric of land reform.

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509 Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178) p. 36.

510 SHRC, *Written evidence to the Rural Affairs, Climate Change and Environment Committee Land Reform (Scotland) Bill*, (Edinburgh, October 2015) <www.scottishhumanrights.com/media/1260/shrcraccesubmission301015.docx> [accessed 1 June 2018].

511 Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178).

512 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, Doc A/RES/70/1; House of Commons International Development Committee, *UK implementation of the Sustainable Development Goals*, HC 103 (London: The Stationary Office 2016).

513 SHRC, *Consultation Submission - Future of Land Reform in Scotland* (Edinburgh, February 2015) <www.scottishhumanrights.com/media/1353/shrcthefutureoflandreformfeb2015.docx> [accessed 1 June 2018].

3.8 PART 2: CONCLUSIONS

The key point, concerning the inclusion of the ICESCR, is that while judicial recognition of socio-economic rights is not impervious to criticism, the available evidence undoubtedly shows that the rights contained in the ICESCR can be justiciable. Despite this, the effect of the ICESCR in Scots law will likely remain limited. It is clear that socio-economic rights have been protected in some form in the UK since before the dawn of the welfare state. However, existing protections are subject to notable criticism, and the shoe-horning of socio-economic rights into the ECHR and administrative law has its limits.[514]

The relevant non-convention rights have been introduced into several Acts of the Scottish Parliament to broaden the existing human rights discourse in relation to contemporary land reform. However, this does not constitute implementing legislation in a manner comparable to the HRA. Critically for land reform, this means that the widening of the human rights discourse in this manner does not change the devolved competencies of the Scottish Ministers and public bodies. That being so, the ICESCR has an important role to play at the policy level and when exercising Ministerial discretion. Other relevant non-convention rights such as the SDGs and VGGTs have a role to play at a public policy level but do not impose legal obligations. Critically, it is submitted that the inclusion of relevant non-convention rights does not allow for the reinterpretation of A1P1 in a manner that would constitute incompatibility.

3.9 PART 3: NATIVE TITLE AND PROPERTY RIGHTS

Questions of "native title" have been sporadically cited in relation to contemporary Scottish land reform.[515] In 2010 the "chief" of Clan Ranald (which is part of Clan MacDonald, to whose headship he laid claim) petitioned the Scottish Parliament to investigate native title in Scotland under the "*Duthchas/Duthaich*" system of land tenure. The term *Duthchas* has several meanings but they included the belief in the hereditary right of possession to land. It is not a legal concept, but one based on custom and derived from the old clan tradition of land given in return for service. Occupation of a holding therefore was seen as being justifiable in moral terms and was in explicit conflict with the legal rights of private property in land.[516] The argument was that as the Abolition

[514] See Palmer (n 449).

[515] Hoffmann (n 39) 295.

[516] Devine (n 117) p. 300.

of Feudal Tenure etc. (Scotland) Act 2000 left earlier Norse Udal tenure in Orkney and Shetland unperturbed, the same should apply to concepts of native title.[517] The petition compared *Duthaich* claims to other claims for native title around the world, notably citing the landmark case of the High Court of Australia in *Mabo v Queensland*.[518] The decision in *Mabo* overturned the doctrine of *terra nullius* in Australia on which colonial and existing titles to land were based. The decision recognised that indigenous peoples had title to land prior to the colonisation of Australia and in doing so, recognised continuing native title.[519] This claim by MacDonald came from a twenty-year bitter court battle in which MacDonald was eventually declared the first chief of Clan Ranald since 1848.[520] MacDonald felt that with this title (which remains disputed by many historians) should come title to the native lands of the MacDonalds of Keppoch. The claim of MacDonald is somewhat opportunist and eccentric, but others continue to argue that contemporary conceptions of property rights and land ownership should be set aside in favour of conceptions of native title.[521]

It is clear that the Highlands and Islands have a distinct cultural and linguistic composition to the rest of Scotland. As noted in chapter one, this can be observed in the history of land ownership and land law.[522] A small collection of activists, theologians, and politicians have come to argue that native title in the Highlands and Islands should be recognised to respect this distinct history.[523] Devine notes that "[t]he Gaels were not being dominated by a foreign power. But there are several aspects of their experience which suggest the impact of international colonialism".[524] To Hoffman "[w]hen the clan chiefs turned into landlords and the Scottish landscape became private property, a tension was created with the old and deeply-held belief that the land was a common heritage".[525] Inspired by the UN Declaration on the Rights of Indigenous Peoples and replicating the Scandinavian Sami Parliament, the Crofters' Assembly in 2008 declared that:

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517 H. MacQueen and S. Wortley, "Ur Duthchas, or native title in the Scottish Highlands?" (Edinburgh: Scots Law News, 4 January 2010).

518 *Mabo v Queensland* (1992) 175 CLR 1 (Australia).

519 P. McHugh, *The Modern Jurisprudence of Tribal Land Rights* (Oxford: OUP 2011).

520 I. Herbert, "McDonald clan chief wins bitter court battle for title" *The Independence* (London: 13 September 2006).

521 J. Hunter, "Rights-based land reform in Scotland: A Discussion Paper for Community Land Scotland" (February 2014) <http://www.andywightman.com/docs/Hunter_rights_based_land_reform.pdf> [accessed 1 June 2018].

522 D. Walker, *A Legal History of Scotland Vol. 1* (Edinburgh: W. Green 1988) p. 354.

523 A. McIntosh, *Soil and Soul: People versus Corporate Power* (London: Aurum Press 2001).

524 Devine (n 117) p. 319.

525 Hoffmann (n 39) 295.

> The Scottish Crofting Foundation calls on the government to: recognise crofters as indigenous people of the Highlands and Islands; respect the growing body of international law on indigenous people; and devolve power and decision-making on indigenous issues to the people who maintain the indigenous cultures of the Highlands and Islands.[526]

The question is whether native title should be allowed to influence the application of A1P1, or even displace or inherently limit existing conceptions of rights to property and title to land. The UK is a signatory to the UN Declaration on the Rights of Indigenous Peoples which was adopted by the General Assembly in 2007.[527] Interestingly Australia, Canada, New Zealand, and the United States voted against, although Canada has since removed this objection.[528] The legislation has not been incorporated into domestic law.

Despite this, it is submitted that conceptions of native or indigenous peoples' title should not be formally recognised in Scots law. International law does not set out a formal definition of "indigenous peoples". Instead, we are left with a series of indicators. As Anaya noted, indigenous people are nations and communities that "find themselves engulfed by settler societies born of the forces of empire and conquest".[529] While, as chapter one highlighted, the rhetoric of land reform often portrays existing landowners as a distinct group, it would be wrong to argue that Scotland was colonised in a manner similar to Australia or New Zealand.[530] Further, on the passing of the Declaration on the Rights of Indigenous Peoples in 2007, Pierce, the British representative, noted that the Declaration was not legally binding, nor could it have any retroactive effect.[531] Pierce stressed that no ethnic group or minorities in the UK or its overseas territories could be recognised as indigenous peoples.[532]

This does not mean the concepts of community should be ignored. The community right to buy and the crofting right to buy recognise the importance of "community" even if this concept is difficult to define. Scots law already recognises these regional differences to a certain extent through crofting law, which was originally confined to the crofting counties and gives a level of

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[526] I. MacKinnon, *Crofters Indigenous people of the Highlands & Islands* (Kyle of Lochalsh: Scottish Crofting Foundation, 2008) p. 7.

[527] UN Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc. A/RES/61/295

[528] See S. Allen and A. Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart 2011).

[529] S. Anaya, *Indigenous Peoples in International Law* (Oxford: OUP 2004) p. 3.

[530] See P. McHugh (n 456).

[531] UN Doc. GA/10612.

[532] Ibid.

protection to small-scale landholding, shielding it from market forces. The importance of recognising these regional differences in Scotland was a prominent part of the work of the Napier Commission and allowed crofters security of tenure long before agricultural tenants in the rest of Scotland were given similar protection.[533] Further, even those holding secure AH(S)A 1991 tenancies still do not have a similar absolute right to buy comparable to that provided for crofters.[534] Therefore, while Scots land law does recognise the regional differences, it should not be compared to other claims of native title in former colonised nations.

3.10 CHAPTER TWO CONCLUSIONS

This chapter has shown the prevailing human rights discourse in Scotland. It has discussed the development of the ECHR and the HRA. It proceeded to set out the obligations placed on the Scottish Ministers, the judiciary, public bodies, and quasi-public bodies by the HRA and SA 1998. It then delineated the broadening of the human rights paradigm in Scotland, asserting that this has been a direct response to a perceived overemphasis on individual rights to property in relation to contemporary land law reform.

Chapter two has illustrated that any Act of the Scottish Parliament is not law so far as it is incompatible with any of the Convention rights.[535] Members of the Scottish Government have no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention Rights.[536] Critical for the purposes of this thesis, it is unlawful for the Scottish Ministers to act in a manner that is incompatible with A1P1.

This chapter has shown that the Scottish Ministers have the devolved competencies to refer to the ICESCR and other relevant non-convention rights. However, while socio-economic rights may be justiciable, the Scottish Ministers' inclusion of the ICESCR into its definition of "other rights" does not constitute an implementation by domestic legislation.

Critically for land reform, this means that the widening of the human rights discourse in this manner does not change the devolved competencies of the Scottish Ministers and public bodies.

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[533] Agriculture (Scotland) Act 1948.

[534] AH(S)A 2003; Transfer of Crofting Estates (Scotland) Act 1997.

[535] SA 1998 s. 29.

[536] Ibid s. 57.

That being so, the ICESCR has an important role to play at the policy level and when exercising Ministerial discretion. Other relevant non-convention rights such as the SDGs and VGGTs have a role to play at a public policy level. As such, their effect on how A1P1 is interpreted and applied will be minimal.

It submitted that the Scottish Ministers can, in undertaking their decision-making capacity, have regard to the ICESCR and other relevant non-convention rights, and as such, the Scottish judiciary is also required to have regard to its international human rights obligations. The caveat is that this must be done in a manner that is compliant with their existing obligations and devolved competencies. If, therefore, circumstances were to arise in which more than one compatible interpretation of A1P1 was open to the Scottish Ministers, they would be required, in choosing between those options, to have regard to the ICESCR. Therefore, while the ICESCR can influence the realisation of Convention rights in Scots law, it must be done in a manner that is compatible with A1P1. Despite this, it must be remembered that the ICESCR cannot operate to allow for the limiting or reinterpretation of A1P1 to the extent that such an interpretation is *ultra vires*. Acts of the Scottish Parliament that are not compatible with A1P1 will be held to be "not law".[537]

The final part of this chapter illustrated that, while there have been arguments concerning the existence of a system of native title in Scotland, these should be dismissed. The existence of crofting law in the original crofting counties and the Scottish Ministers' focus on "community" means that regional differences are already recognised in some form in Scots land law. The emergence of claims of the existence of native title to land in Scotland should be viewed as part of the wider narrative and myth of land reform. This is part of the nationalist belief that Scotland is different, even exceptional. Therefore, while native title to land should be dismissed, such claims help to emphasise the disputed nature of rights to property.

[537] *Salvesen* (UKSC) (n 11).

4 CHAPTER THREE
INTERPRETING ARTICLE 1 OF THE FIRST PROTOCOL

4.1 INTRODUCTION

Chapter two of this thesis has shown that the Scottish Ministers and judiciary must act in a manner that is compatible with A1P1. Any act or omission that is incompatible ought to be held to be "not law". Chapter three will set out a six-part rule-based approach to interpreting A1P1, as developed by the ECtHR and applied by domestic courts in Scotland and the rest of the UK. The framework outlined in this chapter will then be applied to the contemporary rights to buy in chapter four.

Part 1 of this chapter will begin by outlining the development of A1P1 and its drafting. It is argued that while the ECtHR has not confined itself to originalist interpretations, the *travaux préparatoires* remains an important source of secondary material when interpreting A1P1 and also serves as a guide to the philosophical and political ideals that resulted in A1P1.[538] This functions as a useful lens to inform contemporary interpretations and the changing face of A1P1.[539] It is posited that A1P1 was the result of political compromise and was drafted in a manner that aimed to make A1P1 a hollow right.

Part 2 of this chapter will outline the differing interpretative methodologies undertaken by the ECtHR. It will show that A1P1 has been subject to a multitude of differing interpretations. It also argues that domestic jurisprudence can be informed by taking into account the interpretive methodology undertaken by the ECtHR. Despite this, the composition and judicial reasoning of the ECtHR remains a limiting factor when attempting to discern a clear set of principles.

Part 3 of this chapter will argue that the Strasbourg and domestic jurisprudence can be reconciled into a rules-based approach that encompasses six tests. These tests can be succinctly summarised as:

1. Is the applicant a victim?
2. Does the applicant hold a possession?

[538] T. Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (2010) 59 *International & Comparative Law Quarterly* 1055, 1078.

[539] A. Coban, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate 2004) p. 125.

3. Has an interference with A1P1 taken place? This involves considering the three rules first set-out in *Sporrong and Lönnroth v Sweden*:
    (a) General interference with the peaceful enjoyment of possessions;
    (b) Deprivation of possessions; and
    (c) Control of the use of those possessions.
4. Was the action of the state lawful within the meaning of the article?
5. Did the action of the state pursue a legitimate aim in the public or general interest?; and
6. Was the interference proportionate, and did it satisfy the fair balance between competing interests?

First, it will argue that the victim test has been interpreted broadly. Second, it will note that "possession" has been given an autonomous meaning and should be disassociated from its domestic meaning. Third, it will argue that while the *Sporrong* categories of interference may serve a purpose regarding compensation, considerable confusion as to the correct parameters between a control of use and a deprivation remain.[540] Fourth, it will be submitted that the lawfulness test requires domestic law to have certain formal qualities and must be sufficiently accessible, foreseeable and compatible with the rule of law. Fifth, it will be contended that the public interest test has been rendered a paper tiger in the face of the margin of appreciation given to contracting states and the significant weight domestic courts have given to democratic institutions. Sixth, it will posit that proportionality must be considered through a structured four-part test. In doing so, it will be argued that A1P1's ability to "bite" and protect the right to the peaceful enjoyment of possessions in domestic legal systems is contained within the proportionality standard. While rights to property are never absolute, the proportionality test offers the opportunity for the judiciary to consider the relative merits of an interference.

4.2 PART 1: THE TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* of A1P1 and questions regarding the historical and theoretical foundations of rights to property remain oddly unexplored.[541] An examination of the highly contested drafting process exposes the differing conceptions of property and the competing political ideologies and

[540] *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35.

[541] A. Marovcsik, "The Origins of Human Rights Regimes: Democratic Delegations in Post-war Europe" (2000) 54 *International Organisations* 217, 219.

difficulties that become apparent when drafting rights to property instruments.[542] After a general debate on the topic, the Preparatory Commission of the Council of Europe ruled by a majority that it was desirable to include the right to property following Article 17 of the Universal Declaration on Human Rights ("UDHR").[543] The UDHR was only adopted after considerable debate and amendment. The British and Australian delegates attempted to delete the clause as they felt property law should be national and not international.[544] In practice, Article 17 has been interpreted as a general right to not rule out individuals or identifiable groups from owning property, rather than an explicit right to property.[545]

The first draft Convention contained the right to the "Freedom from arbitrary deprivation of property".[546] The Consultative Assembly began considering the draft on 19 August 1949, although interestingly, the original proposal by the Rapporteur Teitgen did not contain a comparable property right.[547] The *travaux préparatoires* illustrate the passionate, but often conflicting, conceptions of property held by many of the delegates. The French delegate Bastid stated that

> Property is an extension of the man, and man cannot feel safe if he is exposed to arbitrary dispossession... I do not know if there is any right more ancient or more firmly established than the right to own property. In all civilized nations, there are rules to protect individuals against arbitrary confiscation.[548]

A representative from Ireland feared any tampering or removal with the right to property would be "the thin end of the Moscow wedge".[549] The Committee of Experts did call the attention of the Committee of Ministers to the right in question. It was felt that totalitarian regimes had a tendency

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[542] G. Gretton, "The Protection of Property Rights" in A. Boyle and H. MacQueen (eds), *Human Rights and Scots Law* (Oxford: Hart 2002) p. 275.

[543] *Collected Edition of the "Travaux Préparatoires": Volume I* (Leiden: Martinus Nijhoff Publishers 1975) [herein after, "TP"] p. 182 and 198-200.

[544] UN doc. E/CN/4/AC/1/SR.8, p. 12.

[545] A. Rosas, "Property Rights" in A. Rosas (eds) *The Strength of Diversity: Human Rights and Pluralistic Democracy* (Leiden: Martinus Nijhoff Publishers 1992) p. 137.

[546] TP vol. I, Appendix p. 296.

[547] TP, vol. I, p. 166 (Doc. A 166).

[548] TP, vol. VI, p. 120.

[549] TP, vol. II, p. 104-106.

to interfere with the right to own property as a means of exercising illegitimate pressure on its nationals.[550]

The drafting of a right to property proved to be highly controversial. This was particularly apparent for many of the British delegates who feared that the inclusion of property rights could inhibit their domestic drive to nationalise significant aspects of the British economy.[551] Britain's Labour representative Nally argued that "[t]he basis of Europe's fight for survival is a struggle for the subordination of private property to the needs of the community".[552] The representative went further and suggested that by protecting property, they would be defending a system in which a "tiny handful of people own the means by which millions of others live".[553] The British delegate Davies argued that:

> To uphold fundamental rights to property on the basis of a pre-legal, moral or naturally based conception of the person implies adopting into the 'public reason' of the state a neo-liberal agenda based on freedom of contract and the minimal state. It would open to constitutional challenge political schemes which use the law to redistribute property in order to advance collectively chosen purposes.[554]

While many nations supported the right,[555] the result of these disputes was that the right to property was not incorporated into the Convention signed on 4 November 1950.[556] A considerable amount of the disagreement appears to have stemmed from the actual wording of draft property clauses, rather than the inclusion of a right to property *per se*. The Committee of Experts met in February 1951 to discuss the Protocol. The British proposed a new draft that stated:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. This provision, however, shall not be considered as infringing in any way the right of a State to enforce such laws as it deems necessary either to serve the ends of justice or to secure the

[550] TP, vol. IV, p. 18-21.

[551] TP, vol. VII, p. 767; A. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: OUP 2001) pp. 771-780.

[552] TP, vol. II, p. 74, 78, and 80.

[553] TP, vol. II, p. 80.

[554] TP, vol. II, p. 127.

[555] TP, vol. VII, p.26-27, 30-33, and 46-47.

[556] TP, vol. V, p. 41.

payment of monies due whether by way of taxes or otherwise, or to ensure the acquisition or use of property in accordance with the general interest.[557]

In response, the Belgian government proposed a wording that explicitly required deprivations to be "subject to fair compensation which shall be fixed in advance".[558] This was opposed by the British and the French for differing reasons. The British wanted to avoid the inclusion of a compensation requirement, and the French felt that the second sentence of the draft already incorporated a compensation requirement.[559] Disputes continued around the wording with the inclusion of "arbitrary confiscation" and "compensation" being subject to considerable disagreement.[560] The Commentary of the Secretariat-General helps to explain some of the late amendments.

(a) The phrase "arbitrary confiscation" was thought to be too imprecise in a legal text as it is capable of varying interpretations. Therefore, it was replaced by the phrase "subject to the conditions provided for by law". It was believed to be more precise and to cover adequately the objections in mind.
(b) There was much discussion as to whether or not it should be stipulated that "no one should be deprived of his property except …subject to compensation". Although the majority of the governments were at one time in favour of a provision to this effect, other governments felt unable to accept it, as they did not think it possible to express this principle in terms which would be appropriate to all the various types of cases which might arise, and they could not admit that decisions taken on this matter by competent national authorities should be subject to review by international organs. Nevertheless, the phrase "subject to the conditions provided for by law" would normally require the payment of compensation, since it is normally provided for in legislation on the nationalisation of expropriation of property. Further, the phrase "subject to the conditions provided for… by the general principles of international law" would guarantee compensation to foreigners even if it were not paid to nationals.

[557] TP, vol. VII, p. 186 and 194.

[558] TP, vol. VII, p. 194.

[559] TP, vol. VII, p. 204.

[560] TP, vol. VII, p. 8; Simpson (n 551) pp. 788-789.

(c) The second paragraph was expanded somewhat to make it clear that this article does not prevent the state from collecting taxes or applying other regulatory measures to the whole of property of individuals in question.[561]

Despite some late attempts at revisions by the Federal Republic of Germany, the text that is today A1P1 was agreed on 6 June 1951 with the removal of any reference to compensation.[562] A1P1 was signed in Paris on 20 March 1952.[563] The final text was ratified by ten contracting states and came into force on 18 May 1954.[564]

4.2.1 PART 1: CONCLUSIONS

The *travaux préparatoires* emphasise the conflicted nature of rights to property. The philosophical disputes between individual rights to property and their ability to conflict with wider social and egalitarian interests were a prominent part of the debates. While not expressly articulated, it is difficult not to conclude that the fresh memory of the vast Nazi looting of Europe and the expropriation of Jewish property in Germany, combined with the Soviet Union's mass expropriations, did not at least help underline many of the delegates' determination for the Convention to contain a right to property. Conversely, other delegates articulated their concerns about the inclusion of a right to property using socialist theory. For several delegates, property rights were backwards-looking and had the potential to inhibit progressive and distributive reforms. The content of the *travaux préparatoires* and the prevailing ideological disputes as to the limits of rights to property are found today in the contemporary land reform debate in Scotland.

Our analysis is slightly limited by the fact that the debates of the Legal Committee, the Committee of Ministers, and the Committee of Experts are not published in full. Despite this, the preparatory work offers several important factors that must be taken into account when considering A1P1. To be able to understand the development of the jurisprudence of the Convention organs regarding A1P1, it is necessary to be aware of contracting parties' prevailing political and philosophical concerns besides the canons of interpretation. As the proceeding analysis will highlight, the vagueness of the language contained in the final text makes it difficult to conclude that the drafters

[561] TP, vol. VII, p. 10.

[562] TP, vol. VII, p. 320.

[563] TP, vol. VIII, p. 212.

did not quite achieve the stated aim by the Committee of Experts to adopt a system of "precise definition to the greatest extent possible for the specific rights to be secured".[565]

The final text included in A1P1 is the result of compromise among different philosophical and political concerns, rather than being an expression of a single philosophical approach. This feature of A1P1 makes its interpretation more difficult.[566] A reading of the preparatory works shows that many governments wanted to leave the right to property "as hollow as could be managed".[567] This was well known at the time, as shown in a brief written for a Cabinet Meeting of the British Government in 1951, where Ernest Bevin wrote that the provision on the right of property "is almost meaningless because the reservations seem to cancel out the right".[568]

Despite the best efforts of several delegates during the drafting process, the proceeding analysis will show how the interpretative methodologies of the ECtHR have resulted in a right to property that requires interference to be lawful, in the public interest, and proportionate in a manner that satisfies the fair balance between competing interest. Part 3 will show how these principles have been interpreted and applied domestically since the enactment of the HRA.

4.3 PART 2: INTERPRETATIVE METHOD

The ECHR and its Protocols do not give any direction into how the Convention rights are to be interpreted. While the Vienna Convention on the Law of Treaties 1969 ("VCLT") is not technically retrospective, the Strasbourg Court has chosen to endorse the VCLT to guide interpretation.[569] Article 31(1) of the VCLT outlines the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[570] This is not a straightforward task when interpreting the Convention.[571] As Lord Woolf observed, "the ECHR is utterly unlike the 'black letter' or detailed legislation we are used to".[572] From the earliest days, concerns over the drafting of the

[565] TP, vol. VII, pp 126-128.

[566] Coban (n 539) p. 125.

[567] Allen, *Property and The Human Rights Act 1998* (n 25) p. 1.

[568] CAB 128/19 CM 4 (51) considering CAB 129/44 CP (51) 10 of 15 Jan 1951.

[569] United Nations, Treaty Series, vol. 1155, 331 Article 4; *Golder v United Kingdom* (1979) 1 EHRR 524, [33]-[34].

[570] United Nations, Treaty Series, vol. 1155, 331 Article 31(1).

[571] See P. Sales, and R. Ekins, "Rights-consistent interpretation and the human rights act 1998" (2011) 127 *Law Quarterly Review* 217, 223.

[572] *Popular Housing and Regeneration Community Association Limited v Donoghue* [2002] QB 48 (CA).

ECHR have been apparent. A passionate note from the personal papers of the then Lord Chancellor, Lord Jowitt, outlined that his primary concerns with the Convention were that the rights contained where "so vague and woolly that it may mean almost anything".[573] Thus, the ECtHR has undertaken a multitude of differing interpretive methodologies. These can roughly be split into "judicial restraint" and "judicial activist" principles.[574]

4.3.1 JUDICIAL RESTRAINT

The undertaking of a restrained interpretative method can be broken down into several sub-concepts: "intentionalism" methodology is outlined in Article 32 of the VCLT which states that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".[575] The problem when considering A1P1 and the Convention, in general, is that the *travaux préparatoires* are often difficult to reconcile, and as already highlighted, the preparatory works repeatedly highlight theoretical disputes rather than the clear intent of the drafters.

A "textualist" interpretation seeks to determine what meaning the provision had at the time of drafting. In this sense, it is comparable to the concept of "originalism" as practised by several justices in the American Supreme Court, most famously by Justice Scalia.[576] This methodology stands contrary to the "living instrument" theory of interpretation discussed below. The problem with taking a textualist approach to interpreting A1P1 is that the wording is opaque and as such principles are difficult to garner from only looking at the exact wording of A1P1.

The "margin of appreciation" is not a right but as a matter of judicial self-restraint. The Strasbourg Court is conscious of its position as an international tribunal, and particularly in sensitive areas, will find a violation only if it cannot reasonably be doubted that the acts or omissions of the State

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573 Cited in R. Stevens, *The English Judges: Their Role in the Changing Constitution* (Oxford: Hart 2005) p. 47.

574 See M. Marochini, "The Interpretation of the European Convention on Human Rights" (2013) 7 *Pregledni znanstveni rad* 63.

575 United Nations, Treaty Series, vol. 1155, 331 Article 32.

576 See S. Calabresi, *Originalism: A Quarter-Century of Debate* (Washington DC: Regnery 2007); A. Scala, "Originalism: The Lesser Evil" (1989) 57 *University of Cincinnati Law Review* 849.

in question are incompatible with those engagements.[577] It is, therefore, a tacit recognition by Strasbourg of its "subsidiary" role in the protection of human rights.[578]

The doctrine of "fourth instance" is used to justify the Strasbourg Court from interfering in domestic laws. This is beyond simply undertaking an expansive margin of appreciation but tends to avoid making any pronouncements.[579] Following a fourth instance interpretative methodology would hold that the right to the peaceful enjoyment of possession should be left wholly to contracting states.

4.3.2 JUDICIAL ACTIVIST INTERPRETATIONS

The ECtHR has on many occasions taken what can be regarded as an "activist" approach when interpreting Convention rights. The "autonomous" concept of legal interpretation describes where the ECtHR gives a meaning to a term within the Convention that is not that accepted at a national level.[580] As this thesis illustrated, and will be further expanded on, this is apparent in relation to the meaning given to "possession" under A1P1.[581] Autonomous interpretations have come in for considerable criticism from politicians and the press, who are quick to fight over allegations of activist judges.[582]

The "living instrument" doctrine of interpreting the ECHR was outlined in *Tyrer v United Kingdom*.[583] The ECtHR considered whether corporal punishment of minors on the Isle of Man constituted degrading treatment under Article 3 of the Convention. The Court observed that it:

> Must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions… the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.[584]

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577 *Cossey v United Kingdom* (1991) 13 EHRR 622.

578 *Handyside v United Kingdom* (1976) 1 EHRR 737 [753].

579 See *Garcia Ruiz v Spain* (2001) 31 EHRR 22; *Perez v France* (2005) 40 EHRR 39.

580 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: OUP 2009) p. 48.

581 *Broniowski* (n 59).

582 *Pine Valley Developments v Ireland* (1991) 14 EHRR 319; *Stretch v United Kingdom* (2003) 38 EHRR 12.

583 *Tyrer v United Kingdom* (1979) 2 EHRR 1.

584 Ibid [31].

The ECtHR has taken a "living" instrument interpretation in many cases but appears to be apprehensive to follow this doctrine when the application relates to particularly sensitive topics, notably in the case of *A, B and C v Ireland* in a case concerning abortion.[585] In relation to A1P1 applications, the living instrument doctrine appears to have been utilised in relation to the definition of "proportionality". In *Handyside v United Kingdom* the court appears to have held that it was not entitled to consider questions of proportionality under A1P1 applications,[586] however in later decisions such as *Marckx* and *Sporrong & Lönnroth* ECtHR allowed for the evolution of A1P1 to place significant importance on the proportionality requirement.[587] Similar developments can be seen in the compensation requirement, which if one considered the *travaux préparatoires* and undertook an intentionalist interpretation, would not be a significant factor in determining whether an interference is justifiable. However, the Court has come to hold that compensation is a critical factor in determining the "fair balance" test for both deprivations and interferences with the control of use of possessions.[588]

The doctrine of "effectiveness" also known as "innovative interpretation" is where the Court is required to give the "fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning".[589] The underlying justification for the doctrine of effectiveness is that contracting states cannot protect Convention rights simply by inactivity but under certain circumstances are required to undertake positive actions to protect rights. In *Oneryildiz v Turkey* a family who had been living in a slum bordering a refuse dump when a methane explosion in the dump caused a landslide which engulfed the applicant's house killing his close relatives brought an application.[590] To the Grand Chamber, "the real and effective exercise of that right does not depend merely on the State's duty not to interfere but may require positive measure of protection". [591]

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[585] *A, B and C v Ireland* (2011) 53 EHRR 13.

[586] *Handyside* (n 578).

[587] *Sporrong & Lönnroth* (n 540); *Marckx* (n 58).

[588] *Lithgow v United Kingdom* (1986) 8 EHRR 329 [120].

[589] J. M. Merrills, *The development of international law by the European Court of Human Rights* (Manchester: Manchester University Press 1990) p. 208.

[590] *Oneryildiz* (n 494).

[591] Ibid [143]-[146].

4.3.3 PART 2: CONCLUSIONS

As the above analysis has briefly shown, A1P1 has been subject to a multitude of differing interpretations by the ECtHR. Unlike the US Supreme Court where the preferred interpretative methods and political ideologies of the Justices are generally known the Judges in the ECtHR are often not as easy to predict. Thus, while the interpretative methods undertaken, and the potential outcome of any given application, will be determined in part by the makeup of the judge(s) sitting in any given case, this is not conclusive nor are judges prone to consistently follow the same methodology.

As will be shown below, differing interpretative methods are seen within A1P1. The general principles that appear to have developed are that the court has taken an activist "autonomous" interpretation of "possession". The ECtHR has taken a wide "margin of appreciation" bordering on "fourth instance" methodology when interpreting the public and general interest. In addition, the ECtHR's definition of "proportionality" appears to have been in part based on a "living instrument" methodology and has taken an activist approach when determining compensation and the fair balance test. It appears that the ECtHR remains likely to interpret applications based on the particular facts before it. This is exacerbated by the lack of a recognisable doctrine of precedent and the fact that ECtHR decisions lack *erga omnes* force.[592] Domestic courts considering the Strasbourg jurisprudence, which they are required to "take into account", are therefore also required, where possible, to consider the interpretive methodology undertaken by the Strasbourg Court. However, this is far from a straightforward task nor, is it usually clear from past decisions.

4.4 PART 3: INTERPRETING ARTICLE 1 OF THE FIRST PROTOCOL

It has been submitted that the *travaux préparatoires*, while offering important insights into the underlying political and philosophical debates that facilitated the inclusion of a right to property in the First Protocol to the ECHR, remain only of limited guidance on the scope of A1P1 as the wording was largely the result of political compromise. Further, it has been shown that the ECtHR has undertaken several interpretative methods when considering key components of A1P1 and that the jurisprudence of the ECtHR is often difficult to reconcile as a result. Part 3 of this chapter

[592] A McHarg "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *Modern Law Review* 671, 673.

will proceed to illustrate the observable "rules" as set out by the ECtHR and how these rules have been interpreted and applied by domestic courts since the HRA. Part 3 is important as it will set tests that must be satisfied for an interference to be compatible with A1P1. These tests will then be applied to contemporary Scots rights to buy in chapter four.

The convention right to the peaceful enjoyment of possession states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[593]

The French text was not inserted into Schedule 1 of the HRA. Domestic courts are, however, required to have regard to the jurisprudence of the ECtHR. The French *Protection de la propriété*, stated that:

> Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.
>
> Les dispositions précédentes ne portent pas atteinte au droit que possèdent les Etats de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.

After considering the difficulties inherent in drafting a right to property clause, the French delegate Pernot concluded that:

[593] A1P1.

> I think actually one may always say of any definition that it lacks clarity. But... side by side with texts, there is a thing called jurisprudence, and we may rely on… to discriminate, when the time comes, between what would be an arbitrary act and what would be a legitimate act.[594]

In other words, Pernot felt that while the text of A1P1 lacked precision, in practice, the Strasbourg institutions would be able to develop over time a suitable body of jurisprudence. In retrospect, this sounds naïve, but it perhaps represents the confidence the delegates had in the Convention and Protocols they had drafted.

A1P1 is written with a very high level of generality and is not in a form that most would consider as comparable to domestic legislation.[595] Instead, A1P1 is closer to a general statement of ideals similar to what one would expect from a political policy document or a statement given in Parliament.[596] Due to several factors, most notably the importance placed on the doctrine of the margin of appreciation in Strasbourg, applications must be fulfilled at a national level through a substantial body of more specific domestic law.[597]

4.5 THE SIX POINT TEST

Part 3 will show that the ECtHR has developed a series of "tests" or "stages" that are followed when considering A1P1 applications. Since the passing of the HRA, domestic courts have come to follow these tests. There are, however, important differences between how the ECtHR has interpreted the ECHR and domestic interpretations of Convention rights in the HRA.

4.5.1 VICTIM STATUS

In a manner similar to the Scots law principles of standing, applicants under A1P1 must be a "victim" within the meaning of Article 34 of the ECHR.[598] The domestic application of Article 34

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[594] TP, vol. VI, p. 106.

[595] Gretton (n 478) p. 275.

[596] Ibid.

[597] *Osborn v Parole Board* [2013] UKSC 64, [2014] AC 1260 [55].

[598] ECHR Article 34; *Christian Institute v Lord Advocate* [2015] CSIH 7, 2015 SC 42 [96].

can be observed in section 7(7) of the HRA and section 100(1) of the SA 1998.[599] The ECHR is concerned with the reality of a situation rather than its formal appearance, to ensure that it guarantees rights that are practical and effective. The interpretation of the concept of "victim" is correspondingly broad.[600] The risk is that an excessively formalistic interpretation of "victim" would risk making the rights guaranteed in the ECHR "ineffectual".[601] The question is whether the alleged victim is "a member of a class of people who risk being directly affected by the legislation", rather than subject to some purely hypothetical risk.[602] It is therefore clear that only natural or legal persons, who had a possession which was capable of being interfered with, can claim victim status.[603] However, an adverse impact on financial interests, resulting from the direct effect of a measure on the property rights or possessions of another person, does not suffice to establish victim status in relation to A1P1.[604]

4.5.2 POSSESSION

An applicant can allege a violation of A1P1 only in so far as the interference relates to a "possession" within the meaning of A1P1. The text states that it concerns the peaceful enjoyment of "possession", with "property" only being used in the second paragraph. The following, differing terms appear three times in both French and English:

French	English
(i) *Biens*	(i) Possessions
(ii) *Propriété*	(ii) Possessions
(iii) *Biens*	(iii) Property[605]

Why the drafters chose to refer to the nature of the interest protected in three different ways in the French text and in two ways in the English text is not clear from the preparatory work. That the English text refers to "possessions" is also an anomaly as it was made clear to the drafters that

599 HRA s. 7(7); SA 1998 s. 100(1).

600 *AXA General Insurance* (n 60) [111].

601 *Lizarraga v Spain* (2004) 45 EHRR 1039, [38].

602 *AXA General Insurance* (n 60) [25]-[26].

603 *McMaster* (OH) (n 108) [152].

604 Ibid [110].

605 A1P1.

it was not a term commonly used in English speaking legal systems.[606] The British delegate Roberts noted that "[t]he word 'possessions', used in the English text, is not really a satisfactory word... [it] would not be found in a British Act of Parliament or any other legal document".[607] The VCLT attempts to reconcile such problems stating that, "when a comparison of the authentic texts discloses a difference of meaning... the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".[608]

The ECtHR has chosen to deal with this inherent confusion by simply ignoring it, and has resultantly interpreted the right to possession broadly.[609] An applicant must generally fulfil the conditions set by domestic law for ownership.[610] However, in practice, the fact that the applicant's property right is not recognised as such in domestic law will not necessarily be fatal to a claim under A1P1.[611] In *Broniowski v Poland* the ECtHR observed that:

> The concept of possessions… has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by A1P1.[612]

It would appear that A1P1 only applies to existing property and does not confer a right to acquire property.[613] The possibility of acquiring a possession in the future is unlikely to constitute a property right protected by A1P1.[614] The applicant must be able to show a legal entitlement to the economic benefit at issue.[615]

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606 TP, vol. VI, p. 88.

607 Ibid p. 88.

608 Vienna Convention on the Law of Treaties, UN, Treaty Series, Vol. 1155, 331, Article 33.

609 *Aston Cantlow* (n 352) [91].

610 *Hadzic v Croatia* App no 48788/99, (ECtHR, 13 September 2001).

611 *Gasus Dosier-und Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403.

612 *Broniowski* (n 59).

613 *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301.

614 C. Weir and R. Moules, "Human Rights Practice" in J. Semor and B. Emmerson (eds) *Human Rights Practice* (London: Sweet & Maxwell 2005) para [15.009].

615 *Stran Greek Refineries v Greece* (1994) 19 EHRR 293 [58]-[62].

Possession can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a "legitimate expectation" of obtaining effective enjoyment of a possession.[616] This has to be more than mere "hope of recognition" of a property right which is impossible to exercise, nor can it be a conditional claim which lapses as a result of the non-fulfilment of the condition.[617] Per the ECtHR, this includes the assumed validity of planning permission,[618] the expectation of being allocated a broadcast frequency,[619] the assumed validity of a contractual option,[620] and the retrospective amendment of legislation which deprived the applicant of an accrued statute-based claim for damages.[621] The ECtHR appears primarily concerned with whether a legitimate expectation is sufficiently established domestically to be enforceable.[622] The assets of a business in the form of "goodwill" may be a possession under A1P1.[623]

4.5.2.1 POSSESSION IN DOMESTIC LAW

The traditional Scots law classifications between heritable and moveable; corporeal and incorporeal; and fungible and non-fungible property are therefore ignored.[624] Possession within the meaning of A1P1 must be disassociated from the property law distinctions which have been taught and practised for centuries. Craig's *Jus Feudale,* states that "possession is not a right or title and has nothing in common with a right of property".[625] Thus, while in Scots property law possessions is "a term of art", jurists considering A1P1 applications in Scotland are required to leave their assumptions about possessions and the many maxims and rules drummed into them at law school at the door. Confusion undoubtedly remains. Lord Johnston, in 2001, considering the judicial review of the non-renewal of a liquor licence at the "Shed" nightclub in Glasgow stated

616 *Kopeckyý v Slovakia* (2004) 41 EHRR 944 [35].

617 Ibid.

618 *Pine Valley Development v Ireland* (1991) 14 EHRR 319.

619 *UK Association of Fish Producer Organisations v Defra* [2013] EWHC 1959 (Admin) [105].

620 *Stretch* (n 527).

621 *Presso Cia Naviera SA v Belgium* (1995) 21 EHRR 301.

622 *Saggio v Italy* (2001) 34 EHRR 1068 [24]-[25].

623 *Tre Traktörer AB v Sweden* [1989] 13 EHHR 309.

624 Reid (n 22).

625 Craig (n 51) p. 307.

that "I confess to have some difficulty" with the definition of "possession".[626] Some clarity was given by Lord Reed in *Axa General Insurance v Lord Advocate* when he observed that:

> The concept of "possession" has been interpreted by that court as including a wide range of economic interests and assets, but one paradigm example of a possession is a person's financial resources. That is implicitly reflected in the recognition, in the second paragraph of A1P1, that the preceding provisions do not impair the state's right to secure the payment of taxes or other contributions of penalties.[627]

Domestic courts have applied "possession" to include real rights in moveable and immoveable property,[628] contractual and other personal rights,[629] the right of a landowner to enjoy vacant possession,[630] the right to an agricultural tenancy,[631] the landlords right to recover possession by service of a good notice to quit,[632] and contractual rights, including under a lease.[633] While the autonomous concept does not extend to rights that are unknown in the national law, it may include known "rights" which turn out to be invalid.

A legitimate expectation can constitute a possession under A1P1 even if it is not valid under domestic law.[634] The theoretical basis appears to be that where in reliance on a legal act, and an individual incurs financial obligations, he may have a legitimate expectation that that legal act will not be retrospectively invalidated to his detriment.[635] The ECtHR in *Öneryıldız v Turkey* appears to have placed considerable importance on the applicants being led to believe that they would maintain existing rights.[636]

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626 *Catscratch Ltd v City of Glasgow Licensing Board* 2002 SLT 503 (OH) [27].

627 *AXA General Insurance* (n 60) [144].

628 *Aston Cantlow* (n 352).

629 *Wilson v First County Trust Ltd* (No. 2) [2004] 1 AC 816 (HL).

630 *Manchester Ship Canal Development Ltd v Persons* [2014] EWHC 645 (Ch).

631 *McMaster* (IH) (n 5).

632 *Sheffield City Council v Smart* [2002] HLR 34 (CA).

633 *Mellacher v Austria* (1990) 12 EHRR 391.

634 *Pine Valley Development v Ireland* (1992) 14 EHRR 319 [80]; *Stretch v United Kingdom* (2004) 38 EHRR 12; *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2004] 3 WLR 249 [152] (CA).

635 *Times Newspapers Ltd v Flood* [2017] 1 WLR 1415; [2017] UKSC 33 [47].

636 *Öneryıldız v Turkey* (2005) 41 EHRR 20.

Lord Tyre in *Walton v Scottish Ministers* was not willing to accept the petitioners' claim that the construction of a western peripheral route around Aberdeen was incompatible with their peaceful enjoyment of possessions as A1P1 does not guarantee the peaceful enjoyment of a pleasant environment.[637] In *Peter Laverie v The Scottish Ministers*, Lord Clark held that the removal of a lecturer from Glasgow Clyde College and his subsequent disqualification from serving on other boards at the institution did not constitute a violation of A1P1, as presence on the board did not constitute a possession. Lord Clark noted that "A1P1 protects possessions and the key factor is the actual existence of some economic interest", and in regard to the issues before the court "the office of board member is not a claim or other form of asset. It is not something upon which a monetary value can be put. It is not capable of being transferred or disposed of or bequeathed".[638] It is therefore clear that in almost all instances, the test accepted by the domestic courts, follows that of the European Court and asks if the applicant holds an economic interest or a legitimate expectation of acquiring an interest.[639]

4.5.2.2 CONCLUSIONS ON POSSESSION

The first point to note is that the domestic interpretation of "possession", particularly the test for "legitimate expectation", remains somewhat confused.[640] While the definition of possession is not completely settled the key factor remains the existence of an economic interest or asset.[641] The ECtHR has even sometimes used "asset" as a synonym for possession".[642] As Gray and Gray note "a focus is placed on the legal entitlement concerned rather than the object of that entitlement".[643]

4.6 DETERMINING WHETHER THERE HAS BEEN AN INTERFERENCE: THE THREE RULES

Once a domestic court establishes that the petitioner is a victim under section 7(7) HRA and holds a "possession" within the meaning of A1P1, the question turns to whether the petitioner has

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637 *Walton v Scottish Ministers* [2011] CSOH 131, 2011 SCLR 686 [104].

638 *Peter Laverie v Scottish Ministers* [2017] CSOH 45, 2017 SLT 640 [151].

639 *Stran* (n 615) [58]-[62].

640 *R (Countryside Alliance) v Attorney General* [2008] 2 AC 719 (HL) [21].

641 *AXA General Insurance* (n 60) [114].

642 *R (Reilly) v Secretary of State for Work and Pensions* [2016] EWCA Civ 413 [2017] QB 657 [37].

643 K. Gray and S. Gray, *Elements of Land Law* (Oxford: OUP, 2009) p. 120.

suffered "interference" with that possession and, if so, the nature of that interference.[644] This is divided into where there has been a:

1. general interference with the peaceful enjoyment of possessions;
2. deprivation of possessions; or
3. controls on the use of those possessions.[645]

A state action, which falls within one of these three rules, constitutes interference.[646] The order given in *Sporrong* is slightly misleading, as before examining the first rule, the ECtHR must concern itself with questions of actual interference within the second and third rules. This does not necessarily mean that the first rule is of lesser importance as if the facts do not show deprivation there remains the possibility that measures may constitute an interference with the peaceful enjoyment of property.[647] The ECtHR in *James v United Kingdom* noted that the three rules are not, however, "distinct", in the sense of being unconnected.[648] The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should, therefore, be construed in the light of the general principle enunciated in the first rule.[649] *In AXA General Insurance*, Lord Reed observed that:

> Given that the second and third rules are only particular instances of interference with the right guaranteed by the first rule, however, the importance of classification should not be exaggerated. Although, where an interference is categorised as falling under the second or third rule, the Strasbourg court will usually consider the question of justification under reference to the language of those specific provisions of A1P1, the test is in substance the same, however the interference has been classified.[650]

Before inquiring whether the first general rule has been complied with, it must be determined whether the last two are applicable.[651]

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644 *McMaster* (OH) (n 108) [153].

645 *Sporrong & Lönnroth* (n 540) [61].

646 Ibid [65].

647 *James* (n 61) [37] and [71].

648 Ibid.

649 Ibid [37].

650 *AXA General Insurance* (n 60) [108].

651 *James* (n 61) [37] and [71].

4.6.1 GENERAL INTERFERENCE

The ECtHR has read the first paragraph of A1P1 as not simply a general statement of the right to property, but additionally as a separate right regulating "interference" with property where the interference does not constitute a deprivation or a control of use.[652] Thus a broad range of state activities, which interfere with any of the normal consequences arising out of the ownership of property, will be recognised as giving rise to an issue under the guarantee. In such instances, the ECtHR has determined that the interference must comply with the balancing test.[653] In *Erkner and Hofauer v Austria* a permit that "was an initial step in a procedure leading to deprivation of possession", constituted an interference with enjoyment.[654] The ECtHR appears to have placed considerable importance on the interference being a preliminary step that would ultimately culminate in a deprivation of the land.[655] The development of the general interference standard is comparable to what American jurists would describe as "regulatory takings".[656]

There remains no single concept of what constitutes a "general interference".[657] The first rule in *Sporrong* has been in practice a vestigial category that is used to describe interferences that do not constitute controls of use or deprivation. The ECtHR has accepted that limitations placed on the right to dispose of possessions and legal impediments to peaceful enjoyment constitute interferences under A1P1.[658]

The problem is that the availability of domestic judicial discussion as to what constitutes a general interference is almost non-existent. The reason for this is that it is unlikely that an applicant is going to argue that they have suffered a general interference, as a finding of a general interference is unlikely to result in an award of compensation.

4.6.2 DEPRIVATION

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652 *Beyeler v Italy* (2001) 33 EHRR 52 [98].

653 *Sporrong & Lönnroth* (n 540) [69].

654 *Erkner and Hofauer v Austria* (1987) 9 EHRR 464.

655 Ibid [74].

656 E. Epstein, *Takings* (Cambridge MA: Harvard University Press 1985) pp. 263-282.

657 Allen, *Property and The Human Rights Act 1998* (n 25) p. 107.

658 *Marckx* (n 58) [63].

The second rule in *Sporrong* covers deprivation of possessions.[659] The deprivation of property is the most radical form of interference.[660] It is generally accepted that a deprivation occurs when all the legal rights of the owner are extinguished, and an individual is "deprived of ownership".[661] Formal or *de jure* deprivation involves a formal transfer of title and the owners' rights being completely extinguished.[662] Deprivation may also be *de facto*. In *Sporrong*, the ECtHR asserted that it must look at the reality of the situation as the Convention is intended to guarantee rights that are "practical and effective".[663]

The ECtHR has accordingly taken a broad definition of deprivation as including expropriation and other loss of rights, which flow from the legal consequences of property.[664] One of the critical distinctions between a deprivation on the one hand and control of use on the other is whether the complainant has retained legal title to the possession in question. But even if the complainant has retained legal title, the ECtHR has recognised that there can be what it has called a *de facto* expropriation.[665]

Domestic courts have taken a similarly broad interpretation of deprivation. The Court of Appeal in *R (British American Tobacco UK Ltd) v Secretary of State for Health* observed that:

> [O]ne highly relevant factor in considering whether an interference amounts to a deprivation or a control of use is whether the complainant has retained legal title to the possession in question. But even if the complainant has retained legal title the ECtHR has recognised that there can be what it has called a *de facto* expropriation".[666]

In this instance, *British American Tobacco* criticised the use in an earlier decision of "expropriation" rather than "deprivation". However, per the Court of Appeal, "since the ECtHR itself uses that expression we do not consider that it is a valid criticism".[667] It therefore appears that domestic courts are willing to accept both terms. The key point, as articulated in *British American Tobacco*, is

[659] *Sporrong & Lönnroth* (n 540) [61].

[660] *James* (n 61) [71].

[661] *Handyside* (n 578) [62].

[662] *Lithgow* (n 588) [107].

[663] *Sporrong & Lönnroth* (n 540) [63].

[664] *James* (n 61) [38].

[665] *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2016] EWCA Civ 1182, [2017] 3 WLR 225 [93].

[666] Ibid [93].

[667] Ibid [93].

that "the test for deprivation as opposed to control of use is whether, following the interference, the complainant has retained any meaningful use of the possession in question. If the answer to that question is "yes", then the interference is unlikely to amount to a *de facto* deprivation or expropriation".[668] In *Cusack v Harrow London Borough Council*, Lord Carnwath cited the Grand Chamber in *Depalle v France* to highlight that:

> Regarding whether or not there has been an interference, the Court reiterates that, in determining whether there has been a deprivation of possessions within the second 'rule', it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether the situation amounted to a *de facto* expropriation.[669]

Repeating the jurisprudence of the ECtHR and earlier domestic courts, Lord Clark, in *McMaster* observed that "in order for a deprivation of property to occur, it must be definitive and involve an irrevocable expropriation or transfer of rights to property. A *de facto* expropriation will suffice".[670] Further, his Lordship highlighted that "the enactment of legislation which has the consequence of devaluing a property right, but does not cause the property right itself to disappear, does not amount to an expropriation".[671]

Categorisation by the ECtHR "tends to be result-orientated. It first asks itself whether the interference is of a sort which calls for compensation. If the answer is affirmative, it is likely to classify the interference as a deprivation".[672] It is clear that the critical question for domestic courts in determining whether there has been a deprivation is the extinction of all legal rights of the owner. However, this is not always followed, as difficult situations can arise.[673]

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[668] Ibid [96].

[669] *Cusack v Harrow London Borough Council* [2013] UKSC 40, [2013] 1 WLR 2022 [35] citing *Depalle v France* (2010) 54 EHRR 535 [559].

[670] *McMaster* (OH) (n 108) [155].

[671] Ibid [161].

[672] G. Gretton "The Protection of Property Rights" in A. Boyle and H MacQueen, *Human Rights and Scots Law* (Oxford: Hart 2002) p. 279.

[673] *R (Mott) v Environment Agency* [2016] EWCA Civ 564, [2016] 1 WLR 4338 [87].

4.6.3 CONTROL OF USE

The third rule in *Sporrong* outlines that states may "control the use of property in accordance with the general interest".[674] For a interference to amount to a control of use, it must be a legislative measure that a state deems necessary to control the use of property. A purely administrative decision is therefore not a control of use, although it may constitute an interference with peaceful enjoyment.

Guidance was given in *JA Pye (Oxford) Ltd v United Kingdom* when the ECtHR considered the loss of ownership of land due to the doctrine of adverse possession.[675] While a notice to vacate land owned by the applicant was served on the expiry of the grazing agreement, Graham continued to graze without permission and eventually obtained title after the expiry of the statutory period under section 15 of the English Limitations Act 1980. By a narrow majority of 10:7, the Grand Chambers dismissed the appeal, observing that "the interference with the applicant companies' possessions was a control of use, rather than a deprivation of possessions, such that the case law on compensation for deprivations is not directly applicable".[676] The Grand Chamber, in agreement with the UK Government, noted that:

> [A] requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods, whose aim is to further legal certainty by preventing a party from pursuing an action after a certain date.[677]

This underscores the fact that the ECtHR has given significant weight to questions of compensation when determining the distinction between a deprivation and a control of use.

The ECtHR has interpreted control of use broadly. For example, planning legislation, including the imposition and enforcement of planning and land use restrictions, constitutes "control of use" for the purposes of A1P1.[678] Control of use even extends to restrictions on property use related to

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[674] *Sporrong & Lönnroth* (n 540) [65].

[675] *JA (Pye) (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45.

[676] Ibid [79].

[677] Ibid [79]-[80].

[678] *Allan Jacobsson v Sweden* (1989) 12 EHRR 56 [54].

the provision of housing, such as rent control legislation[679] and measures to control the eviction of tenants.[680] Measures taken to secure the payment of taxes or interest thereon are considered under the second paragraph of A1P1 as a control of use "in the general interest to secure the payment of tax".[681] These include the prohibition on an individual with tax debts leaving the country with belongings and the seizure of those belongings.[682] However, ECtHR jurisprudence remains confused.[683]

4.6.4 CONCLUSIONS ON THE SPORRONG CATEGORISATION

The three categories of interference have been subject to sustained criticism, even if in practice categorization is not always followed. It is reasonable to note that the ECtHR jurisprudence and its domestic interpretation appears to show that a control of use, unlike, a deprivation does not require the payment of compensation.[684] As a result, the ECtHR has in certain instances bent over backwards to avoid classifying an interference with property as deprivation".[685] The ECtHR in *Gillow v United Kingdom* stated that the requirements differed as "a deprivation of property is inherently more serious than the control of its use".[686] However, this clearly is not always the case. There is no moral difference between partial or full deprivation of property, and the magnitude of economic loss resulting from use restrictions can be as serious as that of deprivation.

While applicants may gain a certain tactical advantage, mainly in relation to determining the availability of compensation, it ultimately remains that no conclusion on compensation will be reached by categorisation. The risk is that potential applicants pursuing measures short of the actual transfer of title will, therefore, face unacceptable levels of uncertainty with the potential benefits of the *Sporrong* categorisation being only marginal. This is further compounded by the truism that in practice all interferences are subject to the same proportionality tests, particularly

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679 *Mellacher* (n 633).

680 *Immobiliare Saffi v Italy* (2000) 30 EHRR 756.

681 *Travers v Italy* (App no15117/816 (ECtHR, January 1995).

682 *S v Sweden* (1986) 8 EHRR 310 [311].

683 *Pye* (n 675).

684 *McMaster* (OH) (n 108) [92]; *Banér v Sweden* (1989) 60 DR 128 [142].

685 D. Anderson, "Compensation for interference with Property" (1999) 4 *European Human Rights Law Review* 543, 553.

686 *Gillow v United Kingdom* (1986) 11 EHRR 335 [148].

the requirement that the interferences are proportionate *strictu sensu*. This should be the primary forum to determine compensation and not the *Sporrong* categories.[687]

The *Sporrong* categorisation was strongly criticised and subsequently ignored in the Supreme Court decision of *R (Mott) v Environment Agency*.[688] During submissions Lady Black asked counsel for the respondent in reaction to her observation that regardless of categorisation all interferences are subject to the same proportionality test, "is this really a requirement of the Strasbourg Jurisprudence to categorise".[689] Most familiar with the Strasbourg Court's persistence to focus on categorisation and the many anomalies this has produced will no doubt have already been asking the same question.[690]

The resulting unanimous opinion, written by Lord Carnwath, dismissed the appeal.[691] Affirming the earlier Court of Appeal, decision the Justices observed that they "did not find it necessary to categorise the measure as either expropriation or control", instead "the elimination of at least 95% of the benefit... was clearly relevant to the fair balance".[692] Lord Carnwath asserted that: "the distinction between expropriation and control is neither clear-cut, nor crucial to the analysis".[693]

The decision in *Mott* exemplifies the limits of the *Sporrong* tripartite test in the margins between control of use and deprivation. However, the Supreme Court has spurned the opportunity to offer some clarity to the borders between a control of use and a deprivation.[694] The lesson going forward is that categorisation is not the *sine qua non* of determining whether compensation is due. Despite this, it is likely that litigators, domestic courts, and the ECtHR will continue to shoehorn interferences into a category to attempt to gain a perceived tactical advantage.[695]

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[687] Allen, *Property and The Human Rights Act 1998* (n 25) p. 122.

[688] *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022.

[689] The Supreme Court, Case ID: 2016/0148, Lady Black, 1 hour 52 minutes. <https://www.supremecourt.uk/watch/uksc-2016-0148/131217-am.html> [accessed 1 June 2018].

[690] D. Maxwell, "Reeling in classifications of interferences under article 1 of the First Protocol and the fair balance test. *R (on the application of Mott) v Environment Agency*" (2018) 6 *Journal of Planning and Environmental Law* 639, 644.

[691] *Mott* (UKSC) (n 688) [38].

[692] Ibid [36].

[693] Ibid [32].

[694] Ibid.

[695] Maxwell, "Reeling in classifications of interferences under article 1 of the First Protocol and the fair balance test. *R (on the application of Mott) v Environment Agency*" (2018) 6 *Journal of Planning and Environmental Law* 639.

4.7 ASSESSING WHETHER AN INTERFERENCE IS JUSTIFIED

Any interference with a right to property falling within A1P1, to be compliant with the ECHR and HRA, must satisfy prescribed conditions.[696] Once possession is established, and one or more of the three rules in *Sporrong* have been engaged, A1P1 will have been *prima facie* violated.[697] As noted above the human right to property is a qualified right and can be deprived by states under certain circumstances. The ECtHR has determined that interference must meet the test of legal certainty, be justified in the general or public interest, and there must be a reasonable degree of proportionality between the means selected and the ends sought to be achieved. This is thought to be necessary to ensure that a fair balance between individual and collective interests has been maintained.[698]

4.7.1 LAWFULNESS

Interference with the right to property must first satisfy the requirement of lawfulness. The second sentence of A1P1 asserts that deprivation must be "subject to the conditions provided for by law" and proceeds to provide that states are permitted to enforce "such laws" as it deems "necessary".[699] The concept of the rule of law is of fundamental importance to the Council of Europe.[700] The ECtHR has described it as being inherent in all the articles of the Convention.[701] The rule of law itself is an "umbrella term" and therefore finding a succinct definition is difficult.[702] It should be remembered that the test of legality is a threshold test as the fair balance test "becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary".[703] As such, cases are rarely decided in Strasbourg on questions of legality as the ECtHR does not think it fit for it to determine questions of national law unless the national law has been applied "manifestly erroneously or to reach arbitrary conclusions".[704]

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[696] Murdoch and Reed (n 62) p. 978.

[697] *James* (n 61).

[698] Ibid.

[699] *Iatridis v Greece* (2000) 30 EHRR 97 [58].

[700] See ECHR Preamble and Article 3.

[701] *AXA General Insurance* (n 60) [118].

[702] P. Sale and R. Ekins, "Rights-Consistent Interpretation and Human Rights Act 1998" (2011) 127 *Law Quarterly Review* 217, 218.

[703] *Iatridis* (n 699) [58].

[704] *Beyeler* (n 652).

The ECtHR has consistently held that the terms "law" or "lawful" in the ECHR do not merely refer back to the domestic law but also relate to the quality of the law, requiring it to be compatible with the rule of law.[705] The law must exhibit certain formal qualities. This is consistent with the rule that administrative discretion is never unfettered.[706] The ECtHR in *Sunday Times v United Kingdom*, observed that:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[707]

The concept of lawfulness does not merely require the existence of some domestic law but requires it to be compatible with the rule of law.[708] The criteria of accessibility and foreseeability are not absolute; nor is the prohibition of arbitrariness incompatible with the existence of discretion. The ECtHR has often said that the effect of these requirements in a given situation depends upon the particular circumstances.[709]

The ECtHR in *Silver v United Kingdom* observed that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. A law which confers a discretion must indicate the scope of the discretion.[710] Per Lord Reed in *Imperial Tobacco Ltd v Lord Advocate*:

> … not only that Parliament cannot itself override fundamental rights or the rule of law by

[705] *James* (n 61) [67].

[706] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

[707] *Sunday Times* (n 396) [49].

[708] *AXA General Insurance* (n 60) [161].

[709] Ibid [119].

[710] *Silver v United Kingdom* (1983) 5 EHRR 347.

general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.[711]

The ECtHR has consistently declared that the principle of legal certainty is necessarily inherent in the law of the Convention.[712] Added to this is the general acceptance of "non-arbitrariness". Accordingly, the law must indicate the scope of any such discretion bestowed on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual sufficient protection against arbitrary interference.[713]

The rule of law was fundamental to the drafting of the Convention and has been part of the jurisprudence emanating from ECtHR the creation of the Court. References to the "rule of law", "*Rechtsstaat*" or "*État de droit/prééminence du droit*" are common in European legal systems although these terms differ in their application and are vulnerable to losing their real meaning through translation.[714] The Council of Europe in 2007 sought to promote clarity by passing a resolution stating that in the two authentic language texts of the Convention, "rule of law" and "*prééminence du droit*" are substantive legal concepts which are synonymous.[715] Much work has been done by the European Commission for Democracy through Law ("Venice Commission"), whose founding Statute states that it shall "give priority to work concerning, the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law".[716] The Venice Commission produced a detailed report in 2016 that offers important insights into how the Council of Europe hopes to define the rule of law.[717]

Potential applicants under A1P1 will have to consider "the general principles of international law". The ECtHR has consistently held that the principles of international law referred to in A1P1 do not apply where a state has taken property from its nationals.[718] In the *Lithgow* judgement, it was

[711] *Imperial Tobacco Ltd v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [152].

[712] *Salvesen* (UKSC) (n 11) [56]; *Marckx* (n 58) [58].

[713] *Malone v United Kingdom* (1984) 7 EHRR 14 [67].

[714] Parliamentary Assembly, *The principle of the Rule of Law*, Resolution 1594, 23 November 2007 Doc. 11343.

[715] Ibid.

[716] Article 1(2).

[717] Venice Commission, "Rule of Law Checklist", Study No. 711/2013, 18 March 2016.

[718] *James* (n 61) [59].

ruled that:

> … although a taking of property must always be affected in the public interest, different considerations may apply to nationals and non-nationals and there may well be a legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[719]

The non-application of international law to nationals has been roundly criticised. It runs contrary to the text of A1P1 which states "everyone" and appears to introduce an unjustified distinction between nationals and non-nationals.[720]

In *James,* the ECtHR held that the lawfulness requirement concerning A1P1 only conferred domestic law standards and not an international standard of lawfulness on applications by nationals asserting that international law only applied to non-nationals.[721]

4.7.1.1 CONCLUSIONS ON LAWFULNESS

It is apparent that the ECtHR has limited power to review compliance with domestic law, particularly where it does not appear domestic legal provisions have been applied manifestly erroneously or in such a way as to result in arbitrary conclusions.[722] Despite the limits of the jurisprudence of the Strasbourg Court, a number of general principles can be discerned. First, the interference must have a basis in domestic law. Second, this law must be "accessible" in practical terms, and third, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[723] Interpretation remains confused in many instances. The lawfulness requirement should be considered as a primary ground for assessment and can often overlap with the proportionality requirements as this also involves an assessment of the impact on the individual.[724]

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[719] *Lithgow* (n 588) [116].

[720] L. Sermet, *The European Convention on Human Rights and Property Rights* (Strasbourg: Council of Europe 1999) p. 42.

[721] *James* (n 61).

[722] Murdoch and Reed (n 62) p. 979.

[723] *Malone* (n 713) [69].

[724] Allen, *Property and The Human Rights Act 1998* (n 25) p. 100.

4.7.2 THE PUBLIC INTEREST

Irrespective of which of the three rules in *Sporrong* are engaged, any interference under A1P1 must satisfy the requirement of serving a legitimate public or general interest. The problem is that the notions of public or general interest remain particularly ambiguous and difficult to define. What constitutes the "public interest" is inherently political and based upon underlying moral and economic assumptions. There is no "trump card, fuzzy notion of public interest" and as such, the available literature is vast.[725] Despite this confusion, this section shall illustrate that in practice the doctrine of the margin of appreciation in Strasbourg, and the comparable domestic doctrine of judicial deference, have rendered the public interest requirement a matter wholly for democratic institutions. This is a necessary trade-off to protect democratic values.[726]

The drafting of A1P1 is again open to criticism. Not only are the terms "public interest" and "general interest" slightly different, even if the ECtHR has decided to ignore these differences, A1P1, unlike Article 8 to 11 of the ECHR, does not refer to what is "necessary in a democratic society". The English text refers to the "public interest" in the second sentence and the "general interest" in the third. Problematically, the French text is worded slightly differently. The second sentence reads; "*pour cause d'utilité publique*", and the third sentence refers to "*conformément à l'intérêt general*". The use of "*pour cause d'utilité publique"* translates closer to a "public use" requirement than the public interest. From a purely linguistic perspective, the French text appears to be narrower as it appears *ex facie* to limit what American jurists would call private-to-private takings, where property is taken from one private individual and transferred to another private individual. While the ECtHR in *James* chose to ignore these differences, it remains a concern that the two official language versions of A1P1 do not appear to be drafted in a directly comparable way.[727] In *James*, the applicant, the Duke of Westminster, challenged a provision of the Leasehold Reform Act 1967 which had allowed tenants a statutory right to buy. In *James,* the ECtHR observed that "a taking of property effected in pursuance of legitimate social, economic or other policies may be in the public interest, even if the community at large has no direct use or enjoyment of the property taken".[728]

The ECtHR has stated that economic policy may justify the transfer of property amongst private

[725] Waring, "Private-To-Private Takings and the Stability of Property" (n 27).

[726] *Countryside Alliance* (n 640) [45].

[727] *James* (n 61).

[728] Ibid [40], [41] and [45].

persons. In *Sporrong* it was stated that a balance must be struck between the "demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[729] At the time of writing there does not appear to be a case where the ECtHR has ruled that an interference was not in the public interest. For example, in *Former King of Greece v Greece* the court held that interference did serve a legitimate aim, but surprisingly just not the aims put forward by Greece,[730] and in *Amruois v Italy* the state failed to forward any aim or purpose for deprivation but, the ECtHR mysteriously managed to glean it simply from the "elements of the case".[731]

4.7.2.1 DOMESTIC INTERPRETATION OF THE PUBLIC INTEREST

The principle that states can interfere with rights to property in the public interest did not start with A1P1. In practice, the right to property in Scotland has never been absolute, and while courts and scholars referred to the sacred and exclusive right of landowners, they did not mean absolute in the sense of such rights being untouchable.[732] *Erskine* wrote that:

> It is another legal limitation or restraint on property, that is must give way to the public necessity or utility. This universal right in the public over property is called by Grotius, *domienum eminus*; in virtue of which the supreme power may compel any proprietor to part with what is his own. If, for instance, the public police shall require that a highway be carried through the property of a private person, the supreme power may oblige the owner to give up such part of his ground as necessary for that purpose. But in this case there must, first be a necessity, or at least an evident utility, on the part of the public, to justify the exercise of the right. Secondly, the person deprived of their property ought to have a full equivalent for quitting it.[733]

The role of property in wider society came to be incorporated into Scots conceptions of property in land. Lord Bankton wrote that "the use of property is likewise frequently restrained for the public good: thus sumptuary laws are introduced, that people may not exhaust their substance by

[729] *Sporrong & Lönnroth* (n 540) [69].

[730] *Former King of Greece v Greece* (2001) 33 EHRR 21 [88].

[731] *Ambruois v Italy* (2000) 35 EHRR 125 [28].

[732] See *Sir James Grant v The Duke of Gordon* (1781) Mor. 12820; *MacDonnell v Caledonian Canal Commission* (1830) 8 S. 881.

[733] J. Erskine, *An Institute of the Law of Scotland* (Edinburgh: Bell & Bradfute 1828) (first published 1754) p. 218.

living profusely, and become a burden upon the public".[734] Lord Fitzgerald in *Flemming v Hislop* observed:

> [T]he undoubted right of the proprietor to the free and absolute use of his own property, but there is this restraint or limitation imposed for the protection of his neighbour, that he is not so to use his property as to create that discomfort of annoyance to his neighbour which interferes with his legitimate enjoyment.[735]

The underlying justification for such power is that the loss of private land by numerous individuals is offset by the gain to the wider community to which those individuals belong.[736] Such was implicit in the decision of the House of Lords in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*.[737] The standard of review for expropriation is contentious, but the jurisprudence shows that when interfering with rights to property the court must "scrutinise anxiously the exercise of these powers".[738] Lord Meadowbank in the Court of Session decision of *Todd v Clyde Trustees* observed that "in interfering with private property, Parliament exercises its highest and most delicate powers. And statutes are always construed against such an interference. It is justified only by the necessity and by some public benefit".[739]

When interpreting A1P1, the difficulty comes in defining the "public interest" and "general interest". The problem for domestic courts is that while used interchangeably, neither of these expressions have a fixed nor clear meaning as noted above. The Scottish judiciary has failed to rectify this as they have avoided making any direct pronouncements on its meaning.[740] Domestic courts have been willing to accept a broad range of interferences being in the public interest from the seizure of property under the proceeds of crime legislation to measures banning bouncers with criminal records.[741]

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[734] Lord Bankton, *An Institute of the Laws of Scotland* (Edinburgh: R. Flemming 1751) p. 505.

[735] *Flemming v Hislop* (1886) 13 R (HL) [43].

[736] G. Cowie, "Background and Concept" in J, T. Aitken (ed) *Compulsory Purchase in Scotland* (Edinburgh: William Blackwood & Sons 1983) p. 1.

[737] *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1964 SC 117 (HL).

[738] *Wordie Property Co. Ltd v Secretary of State for Scotland* 1984 SLT 345 (IH) [356].

[739] *Todd v Clyde Trustees* (1841) 3 D. 586 [594].

[740] *Pairc* (n 43) [57].

[741] *R (Nicholds) v Security Industry Authority* [2006] EWHC 1792 (Admin), [2007] 1 WLR 2067; *R v Benjafield* [2003] 1 AC 1099 (HL); *HM Advocate v McSalley* 2000 JC 485 (CJ)

4.7.2.2 THE PUBLIC INTEREST AND THE MARGIN OF APPRECIATION

The Strasbourg court has given member states a wide margin of appreciation when it comes to determining the public interest. The ECtHR in *Hutten-Czapska v Poland* observed that it was not for it to "say whether the legislation represents the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way".[742] Violations will still be found only if the state action can be deemed to be "manifestly unreasonable", although in practice this standard is very high.[743]

The importance of the doctrine was affirmed in the Brighton Declaration in 2012 and was expressly referred to in Protocol 15.[744] Article 1 of Protocol No 15 provides that the following text will be added to the final paragraph of the Convention's Preamble:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[745]

The ECtHR has shown a particularly wide margin of appreciation in relation to any longstanding and complex area of law which regulates private law matters between individuals.[746] As will be shown in the proceeding analysis, the ECtHR has consistently shown a wide margin of appreciation in relation to A1P1 applications at the six stages of reasoning.[747] In the spheres of economic policies, welfare,[748] and other matters which significantly impact upon the public

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[742] *Hutten-Czapska v Poland* (2006) 45 EHRR 52 [167]-[168].

[743] *James* (n 61) [49].

[744] Council of Europe, High Level Conference on the Future of the European Count of Human Rights, (Brighton Declaration) 19-20 April 2012.

[745] Convention for the Protection of Human Rights (Protocol No. 15), 24. VI. 2013.

[746] *Pye* (n 675) [71] and [83].

[747] Ibid.

[748] *Kay v United Kingdom* (2012) 54 EHRR 30 [65]; *Hounslow London Borough Council v Frisby* [2011] UKSC 8, [2011] 2 AC 186.

purse,[749] the ECtHR has shown a great deal of respect to contracting states.[750] The margin is, however, narrower where the right at stake is crucial to the individual's effective enjoyment of intimate key rights.[751]

However, while the Strasbourg Court has consistently cited the margin of appreciation as central to the operation of the Convention,[752] in practice the doctrine has been problematic. The margin has been described as being "as slippery and elusive as an eel".[753] As Judge De Meyer stated in a dissenting opinion:

> The empty phrases concerning the State's margin of appreciation – repeated in the Court's judgments for too long already – are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights. Such terminology, as wrong in principle as it is pointless in practice, should be abandoned without delay.[754]

While member states are given a wide margin of appreciation, it should not be ignored that member states cannot choose to opt-out of the minimum standards[755] and/or individual Convention rights. Such a move would be contrary to the intention of the ECHR.[756] As such, instances of persistent national abhorrence to the application of individual Convention rights cannot be used as a justification to limit the universal importance of the rights contained in the Convention and its Protocols.[757]

The point to highlight is that, in matters of social policy, the ECtHR is unlikely to intervene in the affairs of member states unless the interference is "manifestly unreasonable" and requires an

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[749] J. M. Milo, "The Margin of Appreciation Doctrine of the European Court of Human Rights: Protection of Ownership and the Right to a Home" in E. Reid and D. Visser, *Private Law and Human Rights* (Edinburgh: Edinburgh University Press, 2013), p 486.

[750] *Immobiliare Saffi* (n 680) [49]; *Mellacher* (n 633) [45].

[751] *Kay v United Kingdom* (2012) 54 EHRR 30 [65].

[752] *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 and *Nicklinson v United Kingdom* (Admissibility) (2015) 61 EHRR SE7.WQ.

[753] A. Lester "Universality vs. Subsidiarity: A Reply" (1998) 1 *European Human Rights Law Review* 73, 75.

[754] *Z v Finland* (1998) 25 EHRR 371 [416].

[755] *Immobiliare Saffi* (n 680) [49].

[756] *Pye* (n 675).

[757] F. de Londras and K. Dzehtsiarou, "Grand Chamber of the European Court of Human Rights, A B C v Ireland, Decision of 17 December 2010" (2013) 62 *International and Comparative Law Quarterly* 250, 252.

individual to bear "an individual and excessive burden".[758] As such, the often-voiced concern that the Strasbourg court is waiting to show the Scottish Ministers the red card in relation to its programme of distributive reforms appears misplaced. This is a central point to not only Scots land reform but the ultimate effect of A1P1 in domestic law in the UK.

The doctrine of the margin of appreciation is not applicable in Scots law, as the domestic court is not under the same disadvantages of physical and cultural distance.[759] A considerable body of jurisprudence has, however, developed in which domestic courts have shown an apprehension when it comes to areas of social and economic policy, particularly where public expenditure is involved.[760] Lord Hope observed in *R v DPP ex p Kebeline* that:

> Difficult choices may need to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances, it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be in compatible with the Convention.[761]

This is often called the doctrine of judicial "deference", although the suitability of this term has come to be questioned. The Supreme Court prefers the concept of the judiciary giving due "weight" to the views of democratic institutions who are deemed to have the requisite expertise and critically the democratic legitimacy to balance individual and collective rights.[762] The domestic courts have thus come to give considerable weight to the decisions of democratic institutions, especially in the area of social and economic policy. This can be observed in several Supreme Court decisions regarding housing policy.[763] In cases where the legislature has chosen to act, it is clear that the courts must exercise great restraint in interfering with the decisions made.[764] As Lord Hoffmann famously held, the HRA 1998 "was no doubt intended to strengthen the rule of law

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[758] *James* (n 61) [50]; *Mellacher* (n 633) [48].

[759] *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] 2 WLR 481 [53].

[760] *R v DPP, ex p Kebilene* [2002] 2 AC 366 (HL) [380E-381E].

[761] Ibid [38]

[762] *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 [16]; P. Sales, and R. Ekins, "Rights-consistent interpretation and the human rights act 1998" (2011) 127 *Law Quarterly Review* 217,

[763] *Pinnock* (n 66); *McDonald v McDonald* [2016] UKSC 28

[764] *Karl Construction Ltd v Palisade Properties plc* 2002 SLT 312, 2002 SC 270 (IH) [70].

but not to inaugurate the rule of lawyers".[765]

Despite this apprehension by domestic courts, it is important that they maintain a significant role.[766] The doctrine of judicial "deference" or "weight" does not prohibit domestic courts from considering the decisions of democratic institutions, but it does place a democratic limit as to when interference is justified. In relation to contemporary land law reform, the importance of giving due weight is most apparent in the Inner House decision of *Pairc Crofters Ltd v Scottish Ministers*.[767]

CONCLUSIONS ON THE PUBLIC INTEREST

There are justifiable criticisms as such imprecision risks the public interest being side-lined when *ex facie* the primary beneficiary of a deprivation or control of use is overwhelmingly a private interest.[768] To Gray, this severely diminished property as a *jural* category.[769] It is submitted that this results in the public interest test being rendered a paper tiger. In practice, however, derogation from this standard to allow courts to intervene at a standard lower than "manifestly unreasonable" would go beyond the legitimate powers of the Strasbourg court and would undermine its legitimacy as an institution. Domestically, where the public interest lies should, (unless manifestly unreasonable) remain almost wholly to be determined by democratic institutions. This is necessary to retain democratic legitimacy and to avoid domestic courts become overly politicised. It must be remembered that this does not give legislatures unlimited or near despotic power to legislate as they wish. Instead, the requirements of compliance with lawfulness, the rule of law, and the four proportionality tests means that rights to property are not completely diminished in content.

4.8 PROPORTIONALITY

The ECtHR has developed the German constitutional law principle of proportionality (*Verhältnismäßigkeitsgrundsatz*).[770] Proportionality serves as a methodological tool and a structure through which to consider a given set of facts. Its *raison d'être* remains to systematise competing

[765] *R v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23 [129]

[766] *Medical Costs* (n 759) [54].

[767] *Pairc Crofters* (n 43) [40].

[768] K. Gray, 'Recreational Property' in S. Bright, *Modern Studies in Property Law, Volume 6* (Oxford: Hart 2011) p. 30.

[769] Ibid p. 14.

[770] R. Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 131, 135.

interests, to rationally consider the validity of an interference with an individual's human rights.[771] There remains a conflict between a rule-based approach that favours stability in contrast to an adaptable discretionary standard based on the facts at issue.[772] The latter gives far greater latitude to decision-makers when considering human rights and can confuse principles that are already difficult to reconcile. As such, it is argued that a structured, rule-based approach should be followed.

Taking such an approach does not stifle proportionality requirements into a straightjacket, but to the contrary gives it a structure and a certain level of predictability. This section will set out the rule-based approach to proportionality. It will argue that following a "four-part" structure to proportionality is not only rational from the perspective of consistency but allows for an acceptable standard of review that complies with democratic ideals, whilst not permitting unlimited discretion, for either the court or democratic decision-maker.

The proportionality test only becomes relevant once it has been shown that the interference has complied with the requirements of lawfulness and the public interest.[773] A1P1 remains oddly silent as the Court generally considers proportionality with reference to what is "necessary in a democratic society".[774] Like many of the "qualified" Convention rights, proportionality is often the most important determinant factor in A1P1 applications.

In *Sporrong and Lönnroth,* the ECtHR observed that the rules contained in the first sentence of the first paragraph of A1P1 the ECtHR:

> Must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of [A1P1].[775]

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[771] A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: CUP 2012) p. 458.

[772] S. Sottiaux and G. van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights" (2008) 31 *Hastings International & Comparative Law Review* 115, 118.

[773] *Beyeler v Italy* (No. 2) (2003) 36 EHRR 5.

[774] *Sunday Times* (n 396) [62]-[68].

[775] *Sporrong & Lönnroth* (n 540) [69].

The domestic courts in the UK have applied the proportionality standard using a mixture of the jurisprudence of the ECtHR and other common law jurisdictions. Interestingly, Lord Reed chose to give significant weight to the judgment of Dickson CJ in the Canadian Supreme Court.[776] The Supreme Court of Canada established that to be a proportionate interference with a constitutional right the objective "must be of sufficient importance to warrant overriding a constitutionally protected right or freedoms" and secondly, the "means chosen" must be "reasonable and demonstrably justified".[777] Dickson CJ observed that this involves a form of the proportionality test. Measures must be carefully designed to achieve the objective in question. They must be rationally connected to the objective. Second, the means should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.[778] The case of *R v Oakes* was applied by the Privy Council and the same formulation has been applied by House of Lords and Supreme Court.[779]

The existing domestic interpretation of A1P1 shows that the courts will consider proportionality by asking four distinct questions:[780]

> (1) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
> (2) whether the measure adopted is rationally connected to that aim,
> (3) whether the aim could have been achieved by a less intrusive measure, and;
> (4) proportionality and the fair balance test

These requirements should be treated as separate, but in practice, they form part of the same whole, and therefore foreseeably overlap.[781] This is important to avoid the courts taking an overly simplistic approach and to maintain flexibility as the jurisprudence of the ECtHR is often not a reliable guide.[782] This is due to many factors, including the differing interpretive methods

[776] *R v Oakes* [1986] 1 SCR 103 (Canada).

[777] Ibid.

[778] Ibid [70]-[71].

[779] *Huang* (n 762) [19]; *De Freitas v Permanent Secretary of Ministry of Agricultural, Fisheries, Land and Housing* [1999] 1 AC 69 (PC).

[780] *Medical Costs* (n 759).

[781] *Bank of Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 [20].

[782] *R (Lumsden) v Legal Services Board* [2015] UKSC 41, [2016] AC 697 [34].

undertaken in Strasbourg and the style of reasoning, which often prioritises individual cases over doctrinal clarity, as explained above. Part four "proportionality *stricto sensu*" is comparable to what Alexy calls the "law of balancing".[783] This rule states that the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.

Without a recognisable doctrine of precedent, the ECtHR is not required to give its reasoning in the same manner that would be expected domestically.[784] As such, the case law of the ECtHR should not be considered as setting out concrete principles that will be followed in similar situations. It is important to consider how the ECtHR has applied proportionality in the particular context in question.[785] For clarity, and in the interest of logic, the four-part test should be considered in order. For example, if the first part "a legitimate aim" fails, there can no longer be a legitimate means.

It is important to remember that the ECtHR has approached proportionality in a "relatively broad-brush way" in contrast to the "more analytical approach to legal reasoning characteristic of the common law" leading to "a more clearly structured approach".[786] This is primarily due to the ECtHR recognising that it lacks the necessary nexus to determine where the appropriate balance should be struck in contracting states.[787] As such, the proportionality requirement is inexplicitly tied to the doctrine of the margin of appreciation. While contracting states retain a wide margin of appreciation, it is for the court to determine "whether the requisite balance was maintained in a manner consonant with the applicant's right of property".[788]

As noted above, the doctrine of the margin of appreciation is not applicable in domestic law, but a considerable body of jurisprudence has developed in which domestic courts have shown apprehension when it comes to areas of social and economic policy, particularly where public

[783] R Alexy, *A Theory of Constitutional Rights* (Trans. J. Rivers) (Oxford: OUP 2002) p. 102.

[784] See A. McHarg "Reconciling Human Rights and the Public Interest" (1999) 62 *Modern Law Review* 671.

[785] *R (Lumsden) v Legal Services Board* [2015] UKSC 41, [2016] AC 697 [34].

[786] *AXA General Insurance* (n 60) [70].

[787] *Mellat* (n 781) [71].

[788] *Cusack v Harrow LBC* [2013] UKSC 40, [2013] 1 WLR 2022 [41].

expenditure is involved.[789] It must, however, be remembered that the domestic court is not under the same disadvantages of physical and cultural distance as the ECtHR.[790]

4.8.1 PROPORTIONALITY PART 1: LEGITIMATE AIM

To be proportionate an interference with property under A1P1 must pursue a legitimate aim. Legitimate aim is tied to the requirement of the interference being in the public interest.[791] While interferences may be justified using multiple aims the jurisprudence shows that the "dominant aim" remains the primary concern.[792] The legitimate aim standard is a recognition that there must be a justifiable purpose for interfering with Convention rights. This standard is a relatively low first hurdle, and as such, it is unusual for a court to hold that an interference does not pursue a legitimate aim. In *James v United Kingdom*, the ECtHR observed that:

> The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.[793]

The decision in *James* helps to emphasise that the ECtHR considers the concept of a legitimate aim as inter-related to the concept of the public interest and is to be considered only when giving considerable weight to the doctrine of the margin of appreciation. The nature of the interference will influence where it is determined to be legitimate. As the Strasbourg court said in *Bäck v Finland*, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts to attain the aim of the policy that was being adopted.[794]

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[789] *Huang* (n 762) [16].

[790] *Medical costs* (n 759) [53].

[791] *Činga v Lithuania* App no 69419/13 (ECtHR, 31 October 2017) [86].

[792] *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437 [82].

[793] *James* (n 61) [51].

[794] *Bäck v Finland* (2004) 40 EHRR 1184 [68].

What does not constitute a legitimate aim in relation to A1P1 is difficult to discern. While it is often asserted that interferences for private profit are not a legitimate aim, domestic courts appear willing to justify such interferences by reference to wider public benefits such as increased tax revenue and job creation.[795] It is clear from the ECtHR and domestic jurisprudence that the Scottish Parliament is entitled to a broad area of discretion to determine what is a legitimate aim.[796]

4.8.2 PROPORTIONALITY PART 2: RATIONALLY CONNECTED TO THAT AIM

The second test for determining proportionality is whether the interference is rationally connected to the aim. It is necessary to show that the aims are logically "furthered" by the means adopted.[797] Several recent decisions offer some guidance on what will be considered as "rationally connected". In *R (British American Tobacco UK Ltd) v Secretary of State for Health*, it was held that the introduction of plain packaging for tobacco producers did not violate the petitioner's A1P1 rights as the measures were rationally connected with the aim, namely "the legitimate health objective of reducing smoking prevalence and use".[798] In this instance, the court gave particular weight to the quantitative evidence presented which included academic papers, opinions, and studies.[799]

The requirement of rationally connected does not mean that the object of the interference should be indispensable to the aim.[800] In *International Transport Roth GmbH* Simpson-Brown LJ noted that "it does not compel and is not to be equated with the least intrusive option".[801] In this context, "necessity" is a more flexible concept than "strict necessity". This is not to be equated with the least intrusive option.[802]

A measure may respond to a real problem but nevertheless be irrational or disproportionate because it is discriminatory in some respect that is incapable of objective justification.[803] For

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795 *Sainsbury's Supermarkets* (n 792) [82].

796 *Salvesen*n (UKSC) (n 11) [36].

797 *Mellat* (n 781) [92].

798 *British American Tobacco* (n 665) [587].

799 Ibid [95]-[96], [310], [340], [354] and [381]-[383].

800 S. Kentridgem "Human Rights: A Sense of Proportion" (Tanner Lecture, Brasenose College, Oxford, February 2001).

801 *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (CA) [51].

802 Ibid [51].

803 *Mellat* (n 781) [25].

example, littering is clearly a public and environmental nuisance and therefore measures to stop or limit littering constitute a legitimate aim. The use of lethal force by the police, perhaps even a shoot to kill policy, when faced with littering, would most likely reduce littering. The use of lethal force would, therefore, be rationally connected to the legitimate aim of limiting littering in public. Much to the disappointment of some, such measures would not satisfy the third and fourth proportionality tests, but they would theoretically satisfy points one and two. It is therefore argued that points one and two must be viewed as the first hurdles for proportionality even if they are set very low.

4.8.3 PROPORTIONALITY PART 3: COULD THE AIM HAVE BEEN ACHIEVED BY A LESS INTRUSIVE MEASURE

The third part of the proportionality test asks if the aim could have been achieved by a less intrusive measure. This is also known as proportionate necessity and requires the decision maker to consider the means chosen to achieve the stated aim.[804]

Lord Diplock observed in 1983 that "proportionality in plain English means you must not use a steam hammer to crack a nut if a nutcracker will do".[805] This exposes a disconnect between domestic law and the ECtHR. To the ECtHR, the fair balance test is not synonymous with the "least restrictive alternative" test.[806] As Blackmun J, observed in the US Supreme Court "a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable him to vote to strike legislation down".[807] Dickson CJ made clear in *R v Edwards Books and Art Ltd* that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line".[808] As a result, the fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is

[804] *Coster v United Kingdom* (2001) 33 EHRR 449 [104].

[805] *R v Goldstein* [1983] 1 WLR 151 (HL) [155].

[806] *R (Samaroo) v Secretary of the State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150.

[807] *Illinois Elections Board v Socialist Workers Party* (1979) 440 U.S. 173, 188-188 (United States).

[808] *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 [781–782] (Canada).

disproportionate.[809] Indeed, Parliament might have adopted an alternative approach, but the fact it has chosen not to will be respected unless it is manifestly unreasonable.[810]

Part 3 is important as when combined with part 2 of the proportionality standards it requires decision-makers to rationalise their choices when they interfere with property. It is apparent that domestic courts are willing to consider the rationality of an interference in detail and will take into account the individual circumstances of the victim.[811] The problem is that this requires the judiciary to consider complicated questions, and in the process attempt to answer future hypotheticals. However, this indeterminacy is an inherent part of the decision-making function of the judiciary.

4.8.4 PROPORTIONALITY PART 4: STRICTO SENSU AND THE FAIR BALANCE TEST

The final, and often most exacting standard, for proportionality, is proportionality *stricto sensu*, often called results proportionality. This requires interferences to be proportional in the narrow sense, meaning that the harm caused to the individual must be weighed or balanced against the potential societal gain.[812] It is firmly established that any interference with rights to buy must achieve a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.[813] Parliament has a broad area of discretion in determining where the correct balance should be struck, but a fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden".[814]

Of critical importance to proportionality *stricto sensu* is the requirement of compensation as a means of redressing the imbalance caused by the loss of individual rights. The expropriation of property in land has nearly always been accompanied by some form of monetary compensation.[815] While

[809] *R (Fisher) v English Nature* [2004] 1 WLR 503 (HC) [46].

[810] *Accountant in Bankruptcy v Walker* [2017] CSOH 78, 2017 SLT 890 [20].

[811] *Mott* (UKSC) (n 688).

[812] Barak (n 771) pp. 340-370.

[813] *Salvesen* (UKSC) (n 11) [34].

[814] *James* (n 61) [50].

[815] *De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL); *Burmah Oil* (n 737).

these exists a common law interpretative presumption for compensation for deprivations, in most contemporary applications the rules of compensation have a statutory basis.[816]

The question then turns to whether monetary compensation should be a permissible justification for the individual's rights being extinguished, and if so what level of compensation gives just satisfaction to the victim of a deprivation. As was noted earlier, a specific compensation requirement in A1P1 was deliberately omitted to gain the support of several contracting states, most notably the UK. Thus, the inclusion of a compensation requirement in A1P1 was clouded for over thirty years. The ECtHR has since come to consistently hold that the payment of compensation will be highly relevant to the "fairness" of the balance achieved.[817] In *Lithgow v United Kingdom*, the ECtHR observed that, "the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable".[818] It has even been said that the protection of the right to property would be largely illusionary and ineffective in the absence of any equivalent principle.[819] Significant financial awards by way of "just satisfaction" are now being made.[820] The ECtHR held in *OAO Neftyanaya Kompaniya Yukos v Russia* that it could not depart from the "firmly established" principles of *restitutio in integrum* and ordered Russia to pay the applicants €1,866,104,634.[821] As of writing, this is the largest financial order under A1P1 by way of "just satisfaction".

In practice, the market value of the property is relevant to the balancing process, as it indicates the value that the community attaches to the property in ordinary private transactions.[822] Outside of "exceptional circumstances", the ECtHR has taken the view that just compensation is fair market value.[823] In *JA Pye (Oxford) Ltd v United Kingdom*, the Grand Chamber ruled that "the taking of property without payment of an amount reasonably related to its value will normally constitute a

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816 See Town and Country Planning (Scotland) Act 1997 s. 189; Roads (Scotland) Act 1984; Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947; Land Compensation (Scotland) Act 1963s. 12(2); *Central Board v Cannon Brewery Co* [1919] AC 744 (HL).

817 *Lithgow* (n 588) [120].

818 Ibid [121].

819 *James* (n 61) [54].

820 Murdoch and Reed (n 62) p. 957.

821 *OAO Neftyanaya Kompaniya Yukos v Russia* (2014) 59 EHRR SE12 [21] and [51].

822 T. Allen, "Compensation for Property Under the European Convention on Human Rights" (2007) 28 *Michigan Journal of International Law*, 287, 335.

823 See *Jahn v Germany* (2006) 42 EHRR 49 [111]-[112]

disproportionate interference that cannot be justified".[824] However, in practice, the ECtHR has been apprehensive to make inquiries into the adequacy of an award of compensation. While compensation is considered essential for satisfying proportionality *stricto sensu* in relation to deprivations under A1P1, the requirement for compensation for a control of use remains less clear. The principle appears to be that while not essential, compensation is often a significant factor in determining the "fair balance" in instances of a control of use where the interference is "sufficiently severe".[825]

4.8.4.1 CONCLUSIONS ON PROPORTIONALITY

Proportionality is most often the critical question in A1P1 applications.[826] The proportionality requirement functions as a procedure that requires states to comply with abstract criteria, while recognising the importance of the margin of appreciation in relation to the use of property.[827] The domestic courts with a closer nexus have developed a more exacting standard that serves in giving A1P1 its domestic "bite" against arbitrary interferences with property.

Part 4 of the proportionality tests often resembles the court making a cost-benefit analysis. This complicates the process as the factors taken into account, and the relative merit of each factor, are often dependent on value judgments that are often not commensurable. There is the additional risk that in making such a value judgment, the court moves into the traditional domain of legislature without the requisite democratic credentials.[828] As such, the risk of *ad hoc* decisions remains possible, although it is hoped that a structured approach will limit this risk. The potential limits of the proportionality standard will be discussed in detail in chapter four in relation to contemporary rights to buy.

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[824] *Pye* (n 675) [47].

[825] *British American Tobacco* (n 665) [113].

[826] Sermet (n 720).

[827] D. Carey-Miller, "The Human Right of Property in Land Law: Comparing South Africa and Scotland" E. Reid and D. Visser, *Private Law and Human Rights* (Edinburgh: Edinburgh University Press 2013) p. 471.

[828] J. Morgan, "Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties" in T. Campbell, K. Ewing and A. Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: OUP 2011) p. 429.

4.9 CHAPTER THREE CONCLUSIONS

This chapter has scrutinised the drafting and subsequent interpretation by the Strasbourg Court of A1P1. As Part 1 of this chapter submitted, A1P1 is the result of a compromise between the competing ideologies. The result is that A1P1 was not an effective remedy as initially drafted. Part 3 of this chapter argued that the ECtHR has come to develop a more exacting standard. Despite these limits, it is submitted that a six-part rule-based approach remains the most logical way to determine A1P1 applications. First, applicants must satisfy the victim requirement. Second, they must hold a "possession". When considering A1P1, domestic courts have come to disassociate possession from its normal meaning in Scots law, and have accepted the ECtHR's autonomous interpretation. The primary determinant factor of whether a possession exists, in the meaning of A1P1, remains the existence or the legitim ate expectation of an asset with a measurable economic value.

The domestic courts appear to have largely followed a similar approach to the ECtHR and have approached categorisation of an interference by first asking whether compensation is due. A considerable degree of confusion still exists in how to properly categorise interference mirrored in the conflicting principles from Strasbourg. Indeed, the utility of categorisation must be questioned as all interferences remain subject to the same test of proportionality and the fair balance test.

The lawfulness requirement under A1P1 is comparable, but does not mirror, the domestic legal concept of the rule of law. Despite this, it is important to reiterate that the lawfulness requirement is a "threshold" test that is to be satisfied prior to determining questions of proportionality and the fair balance test. As such, the domestic courts, like the ECtHR, remain prone to respect the decisions of democratic institutions. The public interest requirement has been interpreted with such a wide margin of appreciation that it has been rendered a paper tiger. While, like the ECtHR, domestic courts have stated that the expropriation of property for a wholly private purpose cannot be considered as being in the public interest, in practice, what the domestic courts mean by a wholly private expropriation remains unknown.

It has been submitted that the proportionality standard should be determined through a four-point rules-based test. When interpreting proportionality, it appears the domestic courts will consider: whether there is a legitimate aim which could justify a restriction of the relevant protected right; whether the measure adopted is rationally connected to that aim; whether the aim could have been

achieved by a less intrusive measure and whether; on a fair balance, the benefits of achieving the aim of the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

Parts 2 and 3 of the proportionality requirements place a rationality requirement on the decision maker to justify the interference. Compensation appears to be the critical factor in determining the fair balance test. This is apparent in domestic decisions concerning deprivations and, in many instances, involving a control of use. As such, the proportionality requirement will most likely be the critical factor in determining compliance.

5 CHAPTER FOUR
RIGHTS TO PROPERTY IN PRACTICE: APPLYING A1P1 TO CONTEMPORARY REFORMS

5.1 INTRODUCTION

This thesis has examined the distinct public policy behind contemporary Scottish rights to buy. It then set out the human rights discourse in Scotland. It was shown that the Scottish Parliament remains a body limited by its devolved competences. As such, the Scottish Ministers must undertake their functions in a manner that is compliant with A1P1. It was then shown how the broadening of the human rights paradigm in Scotland to include "relevant non-convention" rights is a significant step, although the effect of these "new" rights is limited. This thesis then proceeded to consider the drafting of A1P1, concluding that the wording of A1P1 is the result of political compromise. The interpretative methodologies undertaken by the ECtHR were then discussed before part 3 of chapter three set out, in detail, the existing six-point-test that the ECtHR has developed when considering A1P1 applications. The principles outlined in chapter three will be applied to the contemporary rights to buy explained in chapter one. Chapter four will do this through the interpretive obligations placed on the Scottish Ministers and the judiciary as shown in chapter two.

Chapter four will argue that the existing debate in Scotland, which tends to ask if A1P1 will act as a "red card" to distributive reform does not adequately appreciate how A1P1 is given effect in practice. The four community mechanisms and two agricultural tenants' rights to buy are all distinct mechanisms with their own operational complexities and applications. Generalisations relating to the A1P1 implications of all six rights to buy taken in totality are not always possible. The proceeding analysis will consider the A1P1 implications of the six mechanisms, but will in most instances refer directly to the distinct right to buy being considered.

5.2 PART 1: APPLYING ARTICLE 1 OF THE FIRST PROTOCOL

This thesis has already shown A1P1 cannot be considered in isolation. This chapter will consider how A1P1 applies to the contemporary rights to buy. Since the passing of the HRA, domestic courts have come to follow these tests:

1. Is the applicant a victim?

2. Does the applicant hold a possession?
3. Has an interference with A1P1 taken place? This involves considering the three rules set out in *Sporrong and Lönnroth v Sweden*:[829]
    (a) General interference with the peaceful enjoyment of possessions;
    (b) Deprivation of possessions; and
    (c) Control of the use of those possessions.
4. Was the action of the state lawful within the meaning of the article?
5. Was the action in the public or general interest?
6. Was the interference proportionate?

5.2.1 VICTIM STATUS

The concept of a "victim" remains broad. However, for Scottish land law reform is it clear that the Scottish Ministers cannot claim to be victims. As Laws LJ put it, the state has "no right of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence".[830] Additionally, interest groups such as Scottish Land & Estates or Our Land will not satisfy the victim status requirement. However, the victim requirement is not particularly exacting and has been interpreted broadly. Concerning contemporary rights to buy, it is clear that the individual(s) or entity holding an interest in land and or ancillary rights that are subject to a right to buy will satisfy the victim requirement.

5.2.2 POSSESSION

The establishment of a "possession" remains critical to claims under A1P1. Contemporary reforms will raise several important points. While the definition of possession is not completely settled, the key factor remains the existence of an economic interest or asset.[831] A1P1 is therefore not confined to landowner's rights of ownership, but includes almost every party to the Scottish land question. In most instances, establishing that there is a possession within the meaning of A1P1 will be a relatively straightforward task.

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[829] *Sporrong & Lönnroth* (n 540).

[830] *R v Somerset County Council Ex p. Fewings* [1995] 2 All ER 513 (DC).

[831] *AXA General Insurance* (n 60) [114].

The on-going *McMaster* litigation highlights the importance of establishing that an individual holds a possession.[832] In *McMaster*, Lord Clark accepted that a tenancy held by a general partner "who had acquired it by virtue of serving a notice in terms of section 72(6) was a possession of the general partner for the purposes of A1P1".[833] Lord Clark rejected the petitioner's averments that "the family farming business", which was said to be dependent upon the tenancy, was a possession of each of the petitioners.[834] To Lord Clark, this term was "meaningless".[835]

Lord Clark was also not willing to accept that section 72(10) of the AH(S)A 2003 "gave the petitioners a legitimate expectation that they would, on a balance of probabilities, obtain a secure [AH(S)A 1991] tenancy of their holding when they came to serve a section 72(6) notice on their landlord".[836] As "there is no settled basis for a claim to a proprietary interest, there can be no legitimate expectation. The legitimate expectation itself cannot constitute the proprietary interest for the purpose of A1P1",[837] and "in relation to succession, a legitimate expectation of succession is not a property right of the other family member, nor is it attached to a property right of that person".[838]

This is an interesting conclusion as there is clear ECtHR authority that a "legitimate expectation" can constitute a possession under A1P1 even if it is not valid under domestic law.[839] What is clear is that mere hope does not constitute a legitimate expectation. The ECtHR in *Öneryıldız v Turkey* appears to have placed considerable importance on the applicants being led to believe that they would maintain existing rights.[840] The petitioners in *McMaster* clearly had an expectation beyond mere hope. The AH(S)A 2003 as initially enacted, and prior to the decision in *Salvesen*, purported to significantly increase the property rights of the petitioners.[841] This was not fanciful but a simple fact. However, caution is necessary. As a jural right, the original tenancy held in a limited

832 *McMaster* (OH) (n 108).

833 Ibid [116].

834 Ibid [119].

835 Ibid [121] and [126].

836 Ibid [117].

837 Ibid [131].

838 Ibid [133].

839 *Pine Valley* (n 563) [80].

840 *Öneryıldız v Turkey* (2005) 41 EHRR 20.

841 *Salvesen* (UKSC) (11).

partnership is a separate proprietary interest to that which exists after the dissolution of the partnership.

The position is therefore left unresolved; all that can be said is that the tenancy held by a general partner constitutes a possession. This is not a novel observation, but the domestic interpretation of "possession", particularly the test for "legitimate expectation", does remain somewhat confused.[842]

Outside of the narrowly defined "legitimate expectation" of obtaining property, A1P1 does not guarantee the right to acquire property.[843] This is because rights to property must be sufficiently established. In *Stran Greek Refineries v Greece* the ECtHR observed that a decision "merely to furnish the applicants with the hope that they would secure recognition of the claim put forward", did not constitute a possession under A1P1.[844] Thus, tenants and communities cannot claim that they have the right to acquire land under A1P1; the anticipation of distributive land reform cannot constitute a possession under A1P1. The critical point for contemporary rights to buy is the existence of an economic interest.

5.3 DETERMINING WHETHER THERE HAS BEEN AN INTERFERENCE

The ECtHR remains concerned with the three-part classification of interferences. However, as argued in chapter three, the merits of this framework should be questioned, and the recent Supreme Court decision in *R (Mott) v Environment Agency* shows that there is at least a feeling in domestic law that the tripartite tests should not always be followed.[845] Therefore, while the categorisations of interferences appear outdated, it is likely to continue to be part of any claim under A1P1. This is due to the fact that once a deprivation is established there is the presumption for the payment of compensation that can only be removed in exceptional circumstances.

[842] *Countryside Alliance* (n 640) [21].

[843] *Stec v United Kingdom* (2006) 43 EHRR 47 [53].

[844] *Stran* (n 615) [60].

[845] *Mott* (UKSC) (n 688) [38].

5.3.1 GENERAL INTERFERENCE

In relation to Scottish land law reform, the initial steps leading to a purchase may constitute a general interference with possession. The question is whether the requirement to register an interest under Part 2 of the LR(S)A 2003, and the automatic registration of all AH(S)A 1991 part 2 rights to buy since the enactment of section 99 of the LR(S)A 2016, constitute a general interference with the landowner's possession. In *Erkner and Hofauer v Austria,* a permit that "was an initial step in a procedure leading to deprivation of possession", constituted an interference with enjoyment.[846] The ECtHR appears to have placed considerable importance on the interference being a preliminary step that would ultimately culminate in a deprivation of the land.[847]

Despite this, it is unlikely that the preliminary steps, short of an actual interference, will be held to constitute a general interference. For example: while a community right to buy, once registered, removes the ability of the owner to freely dispose of his property, it is unlikely that any form of monetary compensation could be claimed for this loss. The loss is similar to existing planning laws which generally do not merit claims for compensation outside of the very narrow category of "deprivation of any beneficial use".[848] This principle is justified in instances where the owner cannot put the land to a beneficial use to the extent that it has become worthless.[849] For example, in relation to the CRtB, the land does not become worthless. However, the deprivation of the right to feely dispose of land is a more restrictive interference with rights to property than the traditional forms of interferences associated with planning law.

5.3.2 CONTROL OF USE

There may be a certain overlap between general interferences and controls of use. The CRtB requires communities to register their interest. Once this is done, the community obtains a right of first refusal before the land can be sold on the free market. The question is whether this constitutes a "control of use" under A1P1. In *Salvesen v Riddell*, the potential restriction on a landlord's right to terminate a tenant's lease was held to constitute a control of use.[850]

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[846] *Erkner* (n 596).

[847] Ibid [74].

[848] Town and Country Planning (Scotland) Act 1997 s. 89; Town and Country Planning Act 1990 s. 137 (Eng.).

[849] M. Purdue, "The Law on Compensation Rights for Reduction in Property Values Due to Planning Decisions in the United Kingdom" (2006) 5 *Washington University Global Studies Law Review*, 493, 503.

[850] *Salvesen* (UKSC) (n 11).

The jurisprudence of the ECtHR shows that a restriction on a landlord's right to terminate a tenant's lease constitutes control of the use of property within the meaning of the second paragraph of the article.[851] This is affirmed by the more recent jurisprudence of the Grand Chamber, where restrictions on the applicant's right to terminate a tenant's lease constituted a control of use.[852]

Questions remain as to whether the right to buy abandoned and neglected land, and the right to buy when the landlord is in breach constitute a control of use. In both instances, the mere existence of the rights to buy adds a level of coercion on landowners and limits their ability to use and abuse their property freely. As the legislation is not yet fully in force, it is difficult to make concrete assertions. As is apparent from the Supreme Court decision in *Mott*, a control of use will only require compensation to satisfy the fair balance in exceptional circumstances where an individual has had to bear an excessive burden.[853] While the definition of "exceptional" has not been described in detail, it appears that the standard is very high. As such, it is submitted that while registration of a community right to buy, or the automatic registration of an agricultural tenant's rights to buy, may constitute a control of use, it is unlikely to constitute an individual and excessive burden on the land-owner.

5.3.3 DEPRIVATION

A deprivation occurs when all the legal rights of the owner are *de jure* or *de facto* extinguished, and an individual is deprived of ownership. Deprivations are observable when tenants and communities exercise the right to buy. For example, part 2 of the AH(S)A 2003 states that where a tenant has the right to buy land, the tenant may proceed to buy the land from the owner or creditor.[854] The crofting community body on the completion of transfer gains title to the croft land, common grazing, salmon fishing, or mineral rights.[855] The entirety of the rights to property held by the original owner(s) are therefore deprived and deprivation under A1P1 has occurred.

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[851] Ibid [33].

[852] *Lindheim v Norway* (2015) 61 EHRR 29 [62].

[853] *Mott* (UKSC) (n 688).

[854] AH(S)A 2003 s. 29.

[855] LR(S)A 2003 s. 68 and 87.

In *Pairc Crofters Ltd v Scottish Ministers*, the Inner House accepted, without hesitation, the appellants' submission that the crofting community right to buy constituted a deprivation under A1P1.[856] It is therefore clear that the rights to buy, once exercised, constitute a deprivation of rights to property under A1P1. This is because the landowner retains no meaningful use of the property once the right to buy is complete. As will be discussed in more detail below, the significance of this is that it creates a presumption for the payment of compensation to the deprived individual(s).

The critical question is when will an Act of the Scottish government or a decision of the Scottish Ministers "go too far" and come to constitute a deprivation. The difficulty is finding a formula that points to the Rubicon that has to be passed. Recognition of this problem is not new. The idea that interference with one of the bundle of rights that constitute property, deprives the individual of the entire use or value of the bundle of rights is observable in the words of Shakespeare's Shylock in *The Merchant of Venice:*

> You take my house when you do take the prop that doth sustain my house.
> You take my life when you do take the means whereby I live.[857]

The Court of Appeal appreciated this in *Mott* where it was observed that "the distinction is not always obvious".[858] Where it was not obvious, the Strasbourg court has considered the matter against the general principle enunciated and established by the first sentence of A1P1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions".[859]

In *McMaster*, Lord Clark observed that a "deprivation of one of the bundle of rights which relate to a property right is not the same as a deprivation of the property right. Rather, it is a control of use".[860] By contrast the Supreme Court in *Mott* observed that it was enough that it [a condition imposed upon a leasehold interest in a salmon fishery] "eliminated at least 95% of the benefit of the right", thus making it "closer to deprivation than mere control".[861] The problem for contemporary Scots rights to buy is that the jurisprudence is often difficult to reconcile. What is clear is that rights to buy, when completed, constitute a deprivation.

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[856] *Pairc Crofters* (n 43) [27].

[857] W. Shakespeare, *The Merchant of Venice* (Oxford: OUP 2016) Act IV, Scene One.

[858] *Mott* (UKSC) (n 688) [50].

[859] Ibid [50].

[860] *McMaster* (OH) (n 108) [156].

[861] *Mott* (UKSC) (n 688) [36].

The problem is in the margins, and in the potentially coercive nature of land law reforms to influence a landowner's behaviour. Another example may arise when a community or crofting community purchase takes a single parcel, but in doing so, diminishes the value of the land-owner's remaining holdings. The question would arise as to whether this loss in value of land that was not part of the community, crofting or agricultural right to buy would constitute a deprivation.

5.3.3.1 CONCLUSIONS ON SPORRONG AND SCOTS LAND LAW REFORM

The Supreme Court in *Mott* shows that the *Sporrong* tripartite tests may not always be followed in practice. However, the presumption of compensation for deprivations will mean that questions of categorisation will continue to be a significant part of any application under A1P1. The question of whether an interference satisfies one of the three rules is fact specific, and generalisations are difficult to make. What is clear is that when the landowner's rights are extinguished and they lose all beneficial use of the land this constitutes a deprivation and there is an interpretive presumption that compensation is due. The registering of a CRtB may constitute a control of use, but it is unlikely that the burden imposed upon the owner will constitute an individual and excessive burden.

As discussed in chapter three, the categorisation of an interference is a preliminary step, as all interferences remain subject to the tripartite tests of lawfulness, the general interest and proportionality. Therefore, while the Scottish judiciary will no doubt be required to offer further guidance on the parameters between the different types of interference, categorisation remains a preliminary hurdle.

5.4 ASSESSING WHETHER AN INTERFERENCE IS JUSTIFIED

5.4.1 LAWFULNESS

This thesis has argued that the ECtHR has, with varying levels of consistency, held that lawfulness requires compliance with the tripartite test of "legal certainty", "non-arbitrariness" and "the rule of law". This is necessarily inherent in the law of the Convention.[862] It is not possible to review

[862] *Salvesen* (UKSC) (n 11) [56].

the legislation in its totality, but this section will consider several of the key terms and provisions. This chapter shall proceed to consider the lawfulness of: sustainable development, community, abandoned and neglected land, and the justiciability of a landlord being in breach.

5.4.2 LAWFULNESS AND SUSTAINABLE DEVELOPMENT

The primary justification for land law reform in Scotland remains "sustainable development". It is found throughout the LRPG and LRRG reports, government guidance, and available literature.[863] Critically it is the primary public policy justification for contemporary rights to buy. Despite this, what is meant by sustainable development beyond vague policy goals remains disputed. The question turns to whether sustainable development is sufficiently accessible, precise, and foreseeable to comply with A1P1. However, as noted above, the lawfulness test remains a preliminary hurdle. This point is underscored by the observation of Lord Gill in *Pairc* that:

> In my view, the expression sustainable development is in common parlance in matters relating to the use and development of land. It is an expression that would be readily understood by the legislators, the Ministers and the Land Court.[864]

5.4.3 LAWFULNESS AND COMMUNITY

To the Scottish Government, one of the primary impetus behind land reform is the idea of rekindling "community".[865] The definition of community that has followed has focused on defining community in geographical terms.[866] To the LRRG:

> Community involves a complex set of relationships between individuals and groups, involving networks and other linkages, such as family and kinship ties, collective voluntary action, informal reciprocity and trust. In addition, there are more intangible aspects such

[863] Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193); Scottish Government, *Scottish Land Rights and Responsibilities Statement* (n 178).

[864] *Pairc Crofters* (n 43) [56].

[865] Scottish Government, *Consultation on the Community Empowerment (Scotland) Bill* (Edinburgh, November 2013) <https://consult.gov.scot/community-empowerment-unit/cerb/supporting_documents/cerbconsultation.pdf> [accessed 1 June 2018].

[866] LRRG, *The Land of Scotland and the Common Good* (n 122) p. 82.

> as sense of place and belonging, shared history and cultural identity, and… attachment to land.[867]

The Scottish Government's most recent guidance states that community may be defined by reference to: postcode unit(s); postcode sector(s) postcode district(s); settlement area(s); locality; electoral ward; community council area; island.[868] But ultimately, "it is up to your community body to decide what best suits your needs".[869] The Guidance leaves the definition of community open to ministerial discretion stating that, "it is for you to demonstrate to Ministers how you have defined your "community" in a way which best suits you".[870]

It is submitted that questions have to be raised about the Scottish Government's definition of community and whether it is suitably precise, accessible, and foreseeable. How to define "community" is deeply problematic as it is one of the most commonly used terms in development circles. It has been acknowledged as being highly elusive, with a multitude of differing interpretations.[871] As Kepe noted, concerning land reform in South Africa, "defining the boundaries of 'local communities', and thus who should be included or excluded as beneficiaries of land reform, is highly problematic. As a result, the implementation of policies targeting 'communities' is met with numerous challenges".[872]

The original definition given for a "community" in part 2 of the LR(S)A 2003 was simply by reference to a postcode.[873] This was unsuccessfully challenged in *Pairc Crofters Ltd v Scottish Ministers*. It was submitted that the definition of community was so vague that it was not law and that the legislation lacked proper safeguards as the legislative definition of community did not adequately provide for the landowner, to the extent that it violated Article 6(1) of the ECHR.[874] The CE(S)A 2015 added part 2 section 34(5A) into part 2 and defines a community "by reference to a postcode

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867 Ibid p. 82.

868 Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193).

869 Ibid p. 12.

870 Ibid p. 12.

871 D. Robinson, *Out of the Ordinary: Learning from the Community Links Approach to Social Regeneration* (London: Community Links, 2010); R. Booth-Fowler, *The Dance with Community: The Contemporary Debate in American Political Thought* (Lawrence, KS: University Press of Kansas 1991).

872 T. Kepe, "The Problem of Defining 'Community': Challenges for the Land Reform Programme in Rural South Africa" (1999) 16 *Development Southern Africa* 415, 415.

873 LR(S)A 2003.

874 *Pairc Crofters* (n 43) [26]-[27].

unit or postcode units", and comprises "the persons from time to time" are "resident in that postcode unit", and are "entitled to vote, at a local government election, in a polling district which includes that postcode unit or those postcode units".[875] The LR(S)A 2016 in relation to the right to buy for sustainable development defines community in a similar manner, stating that a community "comprises the persons from time to time" who are "resident in that postcode unit or in one of those postcode units or in that specified type of area", and are "entitled to vote, at a local government election, in a polling district which includes that postcode unit or those postcode units or that specified type of area (or part of it or them)".[876]

The LR(S)A 2003 requires the community body to demonstrate to Ministers that they have at least 10% of the community to support the registration.[877] In exceptional circumstances, the Ministers will accept less than 10%.[878] While Sheriff McSherry in *Holmehill Ltd v Scottish Ministers* appeared to have taken issue with 13.62% of the community being considered significantly greater than 10%, it was conceded that this was ultimately left to Ministerial discretion.[879] The figure of 10% does appear to be a rather arbitrary figure and a look through the new register of community interests shows that this figure is often just passed. For example, the North West Mull Community Woodland Company Ltd registered an interest in March 2018 with only 11.5% of the community indicating approval of the registration.[880]

This highlights the question of who should speak for, and undertake actions for, the community. This remains subject to dispute. An example of this can be observed on the Island of North Uist where three councillors compelled a feasibility study for a buyout of the local estate. There was no willing seller, and of the seventy people who turned up to a public meeting, only six voted for the study. Despite this, the councillors proceeded to a postal ballot. Whether these three councillors speak for the community is highly dubious and highlights the opportunity for a small minority to manipulate the existing legislative mechanisms.[881]

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875 LR(S)A 2003 s. 34(5A).

876 LR(S) 2016 s. 49(9).

877 LR(S)A 2003 s. 38(2).

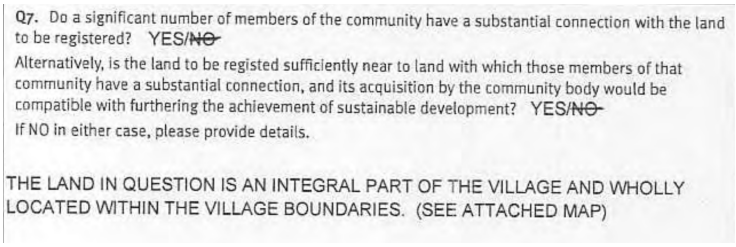
878 Ibid s. 38(2)(d).

879 *Holmehill Ltd* (n 787).

880 Register of Community Interest in Land, Registration No. CB00233, North West Mull Community Woodland Company Ltd, Entered 28 March 2018, Application, para 6.2.

881 M. Webb, "The twilight of private ownership in Scotland" *Financial Times* (London: 1 August 2014).

It is important to consider what the Scottish Ministers are willing to accept as an acceptable definition of the community. An early example can be observed in the application by Crossgates Community Woodland, entered into the Register 28 September 2004. The application states that:



Q7. Do a significant number of members of the community have a substantial connection with the land to be registered? YES/~~NO~~

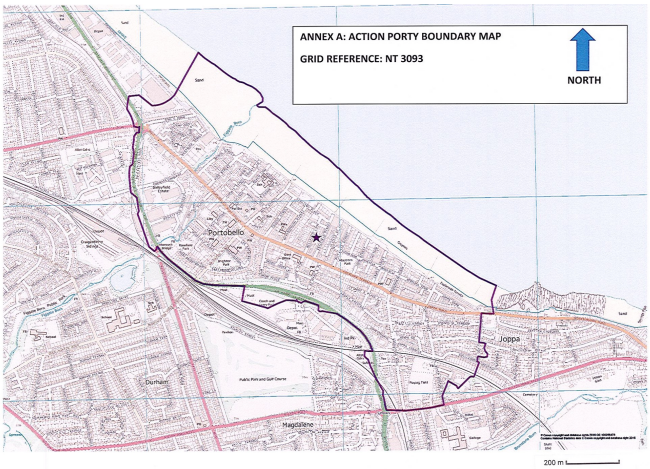
Alternatively, is the land to be registed sufficiently near to land with which those members of that community have a substantial connection, and its acquisition by the community body would be compatible with furthering the achievement of sustainable development? YES/~~NO~~

If NO in either case, please provide details.

THE LAND IN QUESTION IS AN INTEGRAL PART OF THE VILLAGE AND WHOLLY LOCATED WITHIN THE VILLAGE BOUNDARIES. (SEE ATTACHED MAP)

Source: Register of Community Interests in Land, Registration No. CB00006 (Crossgates Community Woodland, Entered 28 September 2004)

A more recent example can be observed in the first urban community purchase in Scotland. The application concerned the Old Parish Church in Portobello for the proposed purpose of a multi-purpose community hub.[882] The Community Body named "Action Porty" defines the community of Portobello as "that area bounded by the Firth of Forth to the north, Kings Road to the west. The southern boundary runs the length of Sir Harry Lauder Road and then along Milton Road East. The eastern boundary is effectively defined by South Morton Street and Coillesdene Drive. The Portobello community boundary is signified by the purple line in the map within Annex A, and is composed of a total of 201 listed postcodes".[883]



[882] The Scotsman, "Community buy-out of Porty church is given go-ahead in landmark decision" *The Edinburgh Evening News* (Edinburgh: 25 October 2016).

[883] Register of Community Interests in Land No. CB002002 (ACTION PORTY, Entered 13 September 2016) (Subjects Description).

Source: Register of Community Interests in Land No. CB000202 (ACTION PORTY, Entered 13 September 2016) Annex A

While this defines the geographic area of Portobello, whether the group represents the community is less clear. The initial meeting in April 2016 only attracted 70 attendees out of a self-defined community of 5,750.[884] The application to the Scottish Ministers shows that Action Porty has 318 members and 23.9% of the community "indicated approval of the registration" by signing their name when asked.[885] The purchase is funded 94% by the Scottish Land Fund, requiring £647,500 of taxpayer's money.[886] The question remains whether inaction by the rest of the community represents tacit consent.

5.4.3.1 CONCLUSIONS ON COMMUNITY

It is therefore argued that the current definition of "community" is unsatisfactory. This is not simply a problem for the Scottish Ministers and the judiciary but could also be a limiting factor in the uptake of community ownership as the mechanisms to facilitate ownership remains confusing to those without the requisite legal skills. As outlined in chapter three, the ECtHR has held that lawfulness requires legal certainty and non-arbitrariness. However, as already noted the lawfulness test remains a preliminary hurdle and the margin of appreciation means that the ECtHR remains unlikely to intervene unless the decision is manifestly erroneous.[887] Therefore, while concerns remain it is unlikely that any of the existing definition of community given in the various rights to buy will be held to be incompatible with A1P1 on the grounds of lawfulness.

5.4.4 LAWFULNESS OF ABANDONED AND NEGLECTED LAND

It is submitted that one of the most significant hurdles to be overcome is whether the definition of abandoned and neglected land satisfies the test of legal certainty. The main problem with the

[884] Ibid Annex E.

[885] Ibid Application Form 12092016.

[886] The Herald, "Cherished church is first city project to benefit from right-to-buy powers" *The Herald* (Glasgow: 10 May 2017).

[887] *Beyeler* (n 652) [108].

part 3A right to buy remains what one MSP called the "vexed questions of definitions of abandoned and neglected land".[888]

The abandonment of land has been traditionally defined as the ability of the owner to unilaterally extinguish all legal rights relating to property.[889] The problem is that there is no authority in Scots law that land can be abandoned.[890] As Lord Carloway observed in the *Scottish Coal* case: "There is no legal process whereby a person can transfer land into oblivion".[891] As such, it appears that when attempting to define "abandoned" in part 3A we are required to disassociate the term from its technical meaning in Scots property law.[892] This rejection of the principles of Scots property law intensifies the problem of finding an accessible and precise definition to satisfy the lawfulness test.

Part 3A defines "eligible land" as land that is "wholly or mainly abandoned or neglected, or the use or management of the land is such that it results in or causes harm, directly or indirectly, to the environmental well-being of a relevant community".[893] Harm includes "the environmental effects of which have an adverse effect on the lives of persons comprising the relevant community", and "does not include harm which, in the opinion of Ministers, is negligible".[894] Part 3A outlines that "eligible land" does not include "land on which there is a building or other structure which is an individual's home", "eligible croft land", and "land which is owned or occupied by the Crown by virtue of its having vested as *bona vacantia* in the Crown".[895] Our analysis in this instance is limited, as much of part 3A is not yet in force. Several amendments are pending. The difficulty in defining "abandoned" and "neglected" was consistently cited during drafting.

Coulter, from the charity *Dumfries and Galloway Third Sector Interface*, giving evidence to the Local Government and Regeneration Committee in 2014, noted prior to the passing of the CE(S)A 2015 that "at some point, the bill will need to be made more specific in its definitions—good luck with that, by the way. If there is not a tighter definition, it is inevitable that we will end up in endless

888 SP, OR, RACCE, 10 December 2014, col. 27.

889 M. Combe and M. Rudd, "Abandonment of land and the Scottish Coal Case: was it unprecedented?" (2018) 22 *Edinburgh Law Review* 301, 302-303.

890 *Scottish Environment Protection Agency v Join Liquidators* [2013] CSOH 124, 2013 SLT 1055 [22].

891 *Scottish Environment Protection Agency v Join Liquidators* [2013] CSIH 108, 2014 SC 372 [103].

892 K. Swinton, "Dealing with abandoned property" (2015) 83(4) *Scottish Law Gazette* 64.

893 LR(S)A 2003 s. 97C(2)(a) and (b).

894 Ibid s. 97C(3)(a).

895 Ibid s. 97C(5).

debate about whether or not land has been abandoned".[896] Richard Lochhead MSP speaking in December 2014 appeared to place a central importance on flexibility in order to make part 3A "reasonably wide ranging". Lochhead MSP, stated that:

> Ministers will have the ability to interpret what that means. We do not want to dwell too much on definitions, because we are just dancing on the head of a pin, but, ultimately, ministers will recognise—as will the communities making the applications—what is "abandoned or neglected".[897]

Without further guidance and any judicial consideration, what constitutes abandoned or neglected land remains obscure and to be determined wholly by the discretion of the Ministers. The *Law Society of Scotland* predicted that the introduction of a right to buy abandoned and neglected land would be "thwarted by the complexity of the proposals and potentially limit rather than empower local groups and stall development plans for neglected land in urban areas".[898] The *Law Society of Scotland* also noted that "[t]he procedure for registering community interest in abandoned or neglected land, which is undefined in the bill, is similar to Compulsory Purchase and there should, therefore, be a requirement for a viable business plan and robust development proposals".[899]

It is therefore argued that there remain serious concerns about the lawfulness of the right to buy abandoned and neglected land. Part 3A is not yet in force, and it is hoped that further guidance will be issued. Not only will the poorly drafted definition most likely result in limited uptake, but it will also add another level of uncertainty to existing owners who will be unable to determine whether their land is "wholly abandoned or neglected".

5.4.5 LAWFULNESS LANDLORD IN BREACH

The LR(S)A 2016 section 100 amends the AH(S)A 2003 with a new right for a tenant to apply to the Land Court for an order of sale "where the landlord is in breach".[900] This is only possible

[896] SP, OR, LGR, 27 October 2014, col. 19.

[897] SP, OR, RACCE, 10 December 2014, col 28.

[898] Law Society of Scotland "Urban 'right to buy' plans too complex" (Edinburgh: 10 September 2014 < https://www.lawscot.org.uk/news/2014/09/urban-right-to-buy-plans-too-complex/ > [1 June 2018].

[899] Ibid.

[900] LR(S)A 2016 s. 100; AH(S)A 2003 Pt 2A.

when the landlord has failed to comply with an order to remedy a material breach of the landlord obligations in relation to the tenant by the Land Court.[901]

The Land Court must be satisfied that "the failure substantially and adversely affects the tenant's ability to fulfil the tenant's responsibilities to farm the holding in accordance with the rules of good husbandry, greater hardship would be caused by not making the order than by making it, and in all the circumstances it is appropriate".[902] Section 38B(7) states for the AH(S)A 2003, Schedule 6 of the Agriculture (Scotland) Act 1948 is to define the "rules of good husbandry".[903] The guidance issued by the Scottish Tenant Farming Commissioner does not add a huge amount: "The breach must be material and the landlord must have failed to comply with an earlier order to remedy the breach".[904] Serious questions remain over the lawfulness requirement and the right to buy where the landlord is in breach. With amendments pending, and further guidance to be issued, patience is required to determine the full effect of these new provisions.

5.4.6 CONCLUSIONS ON LAWFULNESS

As the above analysis has shown, serious questions remain over the lawfulness of what are the foundational concepts driving contemporary rights to buy. This is part of a wider problem of the quality of legislative drafting at Holyrood. In relation to just the AH(S)A 2003 part 2, Lord McGhie in *Fish v Church of Scotland General Trustee*, noted that "we do not find it easy to agree with his [Mr Fish, party litigant] submission that the relevant legislation is clear, well written and unambiguous".[905]

It has not been possible to cover the application of lawfulness in its entirety to contemporary rights to buy. Instead, the above analysis has highlighted several potential flashpoints. As the above analysis has shown, the lawfulness standard is a preliminary hurdle in A1P1 applications. Domestic law must, however, be sufficiently accessible, precise and foreseeable. Clarity is important as the initial decision-makers dealing with the legislation will be civil servants and the Scottish Ministers.

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[901] Ibid s. 38A(1)((a).

[902] AH(S)A 2003 s. 38B.

[903] Ibid s. 38B(7).

[904] SLC, *Guide to the 2016 Land Reform Scotland Act* (Inverness: Scottish Land Commission 2017).

[905] *Fish* (n 268) [52].

It is apparent that, while sustainable development and community remain difficult to define, the domestic courts are willing to give significant weight to the decisions of democratic institutions. It is therefore unlikely (but not unimaginable), that these two key components of land reform will be held to violate the lawfulness requirement under A1P1. Concerns remain over the meaning given to abandoned and neglected land and where the landlord is in breach. As both are recent enactments and are subject to pending amendments and guidance, it is difficult to make conclusions on the ultimate effect of these provisions.

For communities and agricultural tenants seeking to acquire title to land, the problems of indeterminacy raises further obstacles. As MacInnes from *Global Witness* stated, existing reforms "are already complicated enough. What is needed is simplification rather than greater diversification of the legal routes to achieving this single objective".[906] The onus is on the Scottish Ministers to set out the requisite parameters for these critical terms. The problem is that there is only limited guidance given and relatively sparse judicial comment. Therefore, how to properly and rationally regulate one's affairs remains somewhat lost amongst these opaque terms.

It is submitted that while many problems do remain, and arguments can be made as to the lawfulness of certain central terms used in the rights to buy legislation, the legislation as currently drafted is unlikely to be held to constitute a violation of A1P1. Problems remain over how to define sustainable development or abandoned and neglected land. However, such terms are perhaps no more difficult to discern than more familiar terms like nuisance or irrationality. Further, the lawfulness requirement remains a preliminary hurdle and is tied to the doctrine of the margin of appreciation and judicial deference. Despite A1P1 not acting as a red card to the thrust of the existing legislation, there is a cogent argument to be made that the fear of a challenge as to the lawfulness of a provision his influenced, and will continue to influence, the Scottish Ministers drafting, and the judicial interpretation, of contemporary rights to buy.

5.4.7 THE PUBLIC INTEREST

Chapter three of this thesis has argued that when considering what constitutes "the public interest", the ECtHR has taken a broad margin of appreciation bordering on a fourth instance interpretation, and in doing so, has shown considerable deference to national legislatures.

[906] SP, OR, RACCE, 7 October 2015, col. 38.

Domestic courts have taken a similar deferential approach out of respect for democratic institutions, albeit that more often this is encountered in the slightly different context of actions against administrative authorities, where the principle of Parliamentary sovereignty has a more complex role to play. In *Prest v Secretary of State for Wales*, Lord Denning MR observed that, "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands".[907] This emphasises that domestic courts may well be tempted to limit public authority actions not explicitly on the basis of human rights, but more directly on the concept of Parliamentary intention and the supposed presumptions that attend it.

Statements of the rights to buy being in the "public interest" are found throughout the legislation.[908] The most comprehensive legislative definition is found in the conditions that must be taken into account when determining an application for a community purchase for sustainable development. The LR(S)A 2016 states that:

> [I]n determining what constitutes significant benefit to the community for the purposes of subsection (2)(c) or harm to the community for the purposes of subsection (2)(d), the Scottish Ministers must consider the likely effect of granting (or not granting) consent to the transfer of land or tenant's interest on the lives of the persons comprising that community with reference to the following considerations—
>
> (a) economic development,
>
> (b) regeneration,
>
> (c) public health,
>
> (d) social wellbeing, and
>
> (e) environmental wellbeing.[909]

In relation to the community right to buy, the explanatory notes do not give much guidance, simply affirming that this section "states the conditions that must be met before Ministers may give their consent".[910] The guidance states that "Ministers will determine, on a case-by-case basis, whether

[907] *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 (CA).

[908] LR(S)A 2003 s. 38(1)(e), s. 51(3)(d) and s. 97H(1)(b)(i).

[909] LR(S)A 2016 s. 56(12).

[910] LR(S)A 2003 Explanatory Notes, para. 183.

your CB's particular proposal is in the public interest".[911] There can be little doubt that the criteria in respect of the public interest are wide and involved with many factors".[912]

The right to buy abandoned and neglected land poses several significant questions to our understanding of the public interest and private property. What this measure seeks to do is impose a certain utilitarian obligation on landowners. This is justified on the rationale that is it in the public interest to utilise Scotland's limited supply of land, particularly brownfield land in an urban setting. Individuals' homes are excluded.[913]

The English Court of Appeal decision of *Malik v Fassenfelt* offers an interesting point for dsicussion.[914] The group "Grow Heathrow", who had illegally occupied the land, were supported by the local community.[915] Despite this, the Court of Appeal relied on the earlier decision of Walden-Smith J, who noted that:

> For a private landowner to have to establish that the possession order is justified because his own use of his own land is useful and attractive to the local community and society at large, the use of that land by the current occupier against whom he has a right of possession, particularly where that occupier is a trespasser, runs entirely contrary to the principle of private ownership of land.[916]

The right to buy abandoned land is not directly comparable to an order for possession. However, this decision does bring into focus the question over whether private property can be legitimately deprived due to the caveat that existing possession must be justified on a utilitarian front.

Students of Scots law are taught that the right to ownership includes the *usus* (the right to use and enjoy a thing), *fructus* (the right to derive benefit or profit from using the thing) and abuse (the right to freely dispose or destroy the thing). There are examples when even the public interest has been dismissed as a caveat in favour of rights to property. In the famous 1895 English case of

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911 Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193) para 90.

912 *Holmehill* (n 787).

913 LR(S)A 2003 s. 97C(5).

914 *Malik v Fassenfelt* [2013] EWCA Civ 798.

915 Ibid.

916 Ibid.

Bradford Corpn v Pickles, the House of Lords allowed a landowner, even though acting maliciously, to cut off a supply of clean water, which would otherwise have served the rapidly developing domestic, sanitary and industrial requirements of the City of Bradford.[917] To the House of Lords, the landowner might prefer "his own interest to the public good" and might indeed be "churlish selfish and grasping" but although his conduct might seem "shocking to a moral philosopher", the House of Lords refused to intervene.[918] This is an exceptional case, and while it shows that rights to property have often been sternly protected, it must be remembered that the popular perception of land ownership in Scotland has not reflected the conception of ownership of land as one's sole and despotic dominion.

5.4.8 RIGHTS TO BUY AND A WHOLLY PRIVATE PURPOSE

Contemporary Scots rights to buy allow a company limited by guarantee to buy land or individual tenant farmers to become owner-occupier(s). The line is blurred between the ability of the holders of rights to property to stop other individuals expropriating their rights and the inherent power of the sovereign to take property in the public interest. There is a difference between expropriations that primarily serve the public interest, and those that essentially serve the interest of a private company (even if it does label itself as the "community") or individual tenants.

The question to be considered is whether there are any circumstances in which a court will hold that an interference is not in the public interest in relation to the contemporary rights to buy. The nature of the interference is significant when considering whether it is in the public interest.[919] Guidance was given in the 4:3 split Supreme Court decision in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* where Lord Walker observed that the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's proprietary rights.[920] It has been observed that the power of compulsory purchase being used for private profit is "deeply unattractive".[921]

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[917] *Bradford Corpn v Pickles* [1895] AC 587 (HL).

[918] Ibid [601].

[919] *R v Secretary of State for Transport, ex p de Rothschild* (1989) 1 All ER 933 938. (CA).

[920] *Sainsbury's Supermarkets* (n 792) [84].

[921] *Standard Commercial Property Securities Ltd v Glasgow CC* [2006] UKHL 50, 2006 SLT 1152 [75].

This is a question for ministerial discretion when considering a particular application. It must be discerned whether an application is being made wholly or primarily for a private purpose. There is a split between the differing rights to buy in Scotland. The community and crofting community rights to buy are more likely to satisfy a "public use" requirement compared to the agricultural tenant's right to buy or the right to buy when the landlord is in breach. What constitutes a private purpose is difficult to define, but it is submitted that the Scottish Ministers should consider the following factors: (i) the balance of power between the parties (ii) the overall effect on the parties (iii) the facilitators and agenda setting (iv) location (v) social merit (vi) environmental impact (vii) reasonable possibility of success (viii) democratic merit. These factors overlap with the proportionality tests. The reason they are set out is to offer a framework in which it is possible to consider whether the rights to buy are being used as a stratum for individual private profits that do not serve the public interest.

There remains the problem of defining community, with examples of a handful of individuals being able to use the rights to buy legislation with only minimal support. It is submitted that this should give rise to a greater evidential burden on the individuals who form the organisation to prove that the purchase is in the public interest.

It is apparent that a "wholly private" expropriation is not in the public interest. However, it is almost impossible to envisage what a wholly private expropriation would look like as argument can almost always be made to show some form of public interest. The focus of the right to buy is part of a legislative agenda that aims to facilitate the equitable distribution of land ownership in Scotland. Lord Nicholls in *Wilson v First County Trust Ltd (No. 2)* observed that legislative provisions intended to bring about such fairness, are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another.[922] Therefore, even if the agricultural tenant's or community right to buy do facilitate the transfer of property from one individual to another or a company limited by guarantee, courts are required to look beyond the individual transaction and consider the wider public purpose that has resulted in the interference under A1P1. The doctrine of the margin of appreciation and the weight the courts should give to the decisions of democratic institutions mean that it is highly unlikely that the ECtHR and Scottish judiciary will ever hold land reform to not be in the public interest.

[922] *Wilson* (n 629) [68].

5.4.8.1 CONCLUSIONS ON THE PUBLIC INTEREST

Chapter three of this thesis argued that the public interest test had been rendered a paper tiger due to the wide margin of appreciation given by the ECtHR and the considerable weight given by the domestic courts to the decisions of democratic institutions. The only instance in which a right to buy could be held to not be in the public interest would be if it is apparent that there is a "private-to-private" expropriation. This question is left wholly to the discretion of the Scottish Ministers. It is therefore argued that it is almost impossible to envisage the ECtHR holding any Act of the Scottish Parliament to be contrary to the public interest. This is perhaps only possible in the highly unlikely event that the Scottish Ministers chose to target a particular religious or ethnic minority, although this would be covered by other provisions of the ECHR.[923] Similarly, it is difficult to see a domestic court making a similar finding in relation to contemporary sales orders due primarily to questions of institutional competencies. Put succinctly, and repeating the LRRG, "the responsibility for determining the public interest of the people of Scotland rests with their elected representatives".[924]

5.5 RIGHTS TO BUY AND PROPORTIONALITY

As has been shown in this thesis, proportionality is central to the jurisprudence of the ECHR, even if it is not possible to find the term within the text of the Convention.[925] The existing domestic interpretation of A1P1 shows that the courts will consider proportionality by asking four distinct questions:[926]

> (1) whether there is a legitimate aim which could justify a restriction of the relevant protected right,
> (2) whether the measure adopted is rationally connected to that aim,
> (3) whether the aim could have been achieved by a less intrusive measure, and
> (4) proportionality and the fair balance test.

[923] See ECHR Articles 6, 9, 13 and 14.

[924] LRRG, *The Land of Scotland and the Common Good* (n 122) p. 21.

[925] *Sporrong & Lönnroth* (n 540) [37].

[926] *Asbestos Disease (Wales)* (n 698) [45].

As the above analysis has shown, the ECtHR and domestic courts have been apprehensive when it comes to considering the lawfulness and the public interest test under A1P1. Thus, questions of proportionality and the fair balance test are often the most important considerations.

It is important to view the proportionality standard as an area of discretion given to public officials, the Scottish Ministers and the judiciary. The standard for determining the relative merits of a right to buy cannot be rigidly determined by the decision-makers' whims, self-interests or political inclinations.[927] As H. L. A. Hart wrote in a paper posthumously published in 2013:

> Discretion is after all the name of an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence; it is the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning.[928]

This is why following the rule-based approach to the proportionality standard outlined in chapter three is critical.

5.5.1 PROPORTIONALITY PART 1: A LEGITIMATE AIM

The first stage in determining proportionality requires the court to determine whether the measures that interfere with the Convention right pursue a "legitimate aim".[929] How to approach this analysis within the rule-based prism of proportionality is problematic. The question remains whose authority the court is to consider. The court can choose to take a deontological approach and accept the arguments of democratic institutions as valid due to the expertise within organisations like the Scottish Parliament and its democratic mandate. On the contrary, the court could potentially take a more inquisitive approach and rely on independent experts and research. It must, however, be remembered that it is not for the court to say whether the legislation represents the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.[930]

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[927] H. L. A. Hart, "Discretion" (2013) 127 *Harvard Law Review* 652.

[928] Ibid 656.

[929] *Sofia v San Marino* (2017) 65 EHRR SE7 [68].

[930] *Salvesen* (UKSC) (n 11) [36].

Chapter one of this thesis broke down the reasons for contemporary sales orders into distinct grievances. The first was historical, most notably the legacy of landed power and the Highland Clearances, the second was absentee landowners, transparency of ownership, and tax avoidance; and the third was the high concentration of ownership. In *Holmehill Ltd v Scottish Ministers* Sheriff McSherry observed that "the underlying objective of the land reform programme and the introduction of the community right to buy is the sustainable development of rural communities".[931] More recent statements speak of productivity, community, and the public interest.[932] Central to this is a near social utilitarian view on property. Aileen McLeod in the Scottish Parliament, debating the Land Reform (Scotland) Bill in 2016, outlined the Government's "absolute commitment to… ensuring that land is owned and used in the public interest for the benefit of the people of Scotland".[933] The proceeding analysis will focus on the most prominent "aims" of contemporary reform: sustainable development, community, and diversification of ownership.

5.5.2 SUSTAINABLE DEVELOPMENT AS A LEGITIMATE AIM

In December 2014, while debating the rights to buy for sustainable development in the *Rural Affairs Committee*, Richard Lochhead MSP asserted that "the thrust of our land reform legislation is to promote sustainable development. That is the motivation for intervention and, of course, the justification for it".[934] The problem with defining "sustainable development" was discussed above. While it remains an undefinable concept, several key parts can be discerned and then considered. The first question to consider is whether the current programme of sales orders has an underlying economic rationale. Once again, this is limited by underlying subjective assumptions and the limits of the available evidence.

The Scottish Government guidance states that "sustainable development is an integrated long-term approach to economic, social and environmental issues",[935] noting that the information in

[931] *Holmehill* (n 787) [99].

[932] SP, OR, RACCE, 7 October 2015, 11 March 2015, col. 34-35.

[933] SP, OR, 7 October 2015, col. 49.

[934] SP, OR, RACCE, 7 October 2015, 10 December 2014, col. 30.

[935] Scottish Government, *Guidance for applications made on order 15 April 2016* (n 193), para 84.

the application form will be "crucial in determining whether this criterion is met".[936] The guidance for the community right to buy sets out the Scottish Government's approach to sustainable development.[937] It states that, fundamentally, sustainable development for the Scottish Executive is described by the Brundtland definition: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[938]

It is submitted that serious concerns remain as to whether the opaque nature of "sustainable development" constitutes a legitimate aim.[939] This is further compounded by the fact that the term "sustainable development", while often used, lacks a precise legal definition.[940] The term is broad and encompasses a multitude of often conflicting ideals such as economic growth, social inclusion, ecological factors, and tackling climate change.[941] While the Scottish Parliament information (SPICe) centre briefing states that there is an agreed definition of sustainable development, this was strongly criticised by several experts giving evidence to the Rural Affairs Committee.[942] Livingstone asserted that:

> The problem is not that the term cannot be defined: it is that it can be defined in a number of different ways. Ultimately, if it came before a court, a court might be able to define "sustainable development" as meaning whatever, but the difficulty for a landowner or for somebody looking to buy land is that they may not be clear about what it is until they get to the stage of having the question before the court and being told what "sustainable development" means in the circumstances of the individual case.[943]

Instead of an accepted definition, what exists is a series of "indicators" that address the underlying purpose of sustainable development. These indicators vary in the manner that they can be empirically observed. The result is alternative conceptions of differing factors with the weight

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[936] Ibid para 84.

[937] Ibid para 84.

[938] Scottish Executive Environment Group, *Meeting the Needs… Priorities, Action and Targets for Sustainable Development in Scotland* (Edinburgh: The Stationary Office, 2002) para 2.

[939] *Holmehill Ltd v Scottish Ministers* 2006 SLT (Sh Ct) 79.

[940] V. Barral "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23 *European Journal of International Law* 377, 377.

[941] A. Ross, "It's Time to Get Serious—Why Legislation is needed to make Sustainable Development a Reality in the UK" (2010) 2 *Sustainability* 1101.

[942] SP, OR, RACCE, 7 October 2015, col. 30.

[943] Ibid col. 31.

given to each being left wholly to the discretion of the decision maker.[944] Giving evidence on the LR(S)A 2016 before its enactment, Bovey QC noted that:

> Sustainable development is the aim that is being pursued but it is not an established legal term to which the court will be able to refer in respect of its meaning… Putting it in the explanatory statement is not a satisfactory way of legislating, because the court does not know what to make of the explanatory statement—whether or not it is endorsed by the Parliament.[945]

One of the biggest concerns has to be that there is almost no guidance on the weight to be allocated to differing factors. As a result, it is difficult to point to what the aim of the interference is beyond the poorly defined policy of sustainable development. The Scottish Government appears to overemphasise socio-political considerations to the detriment of economic and particularly environmental factors. As Principle 4 of the Rio Declaration states, "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[946] This has resulted in a definition of sustainable development put forward by Holyrood that better resembles Pearce's notion of "weak sustainability" in which there is no place for the environment.[947] The Scottish Government's own Rural and Environment Science and Analytical Services submitted in 2012 that there was a "lack of clarity over the rationale and remit of Land Reform" and it was "not clear what form this sustainable development should take, or what features should be prioritised".[948]

The question then becomes what the Scottish Ministers are willing to accept as "sustainable development". This is important as it sets out the primary aim of the interference. In the application for a Part 2 Community Right to Buy, the question asks if the land being acquired is "sufficient to further the achievement of the sustainable development of the community". Examples of what the Scottish Ministers are willing to accept can be found on the Registers of Scotland website. Examples include:

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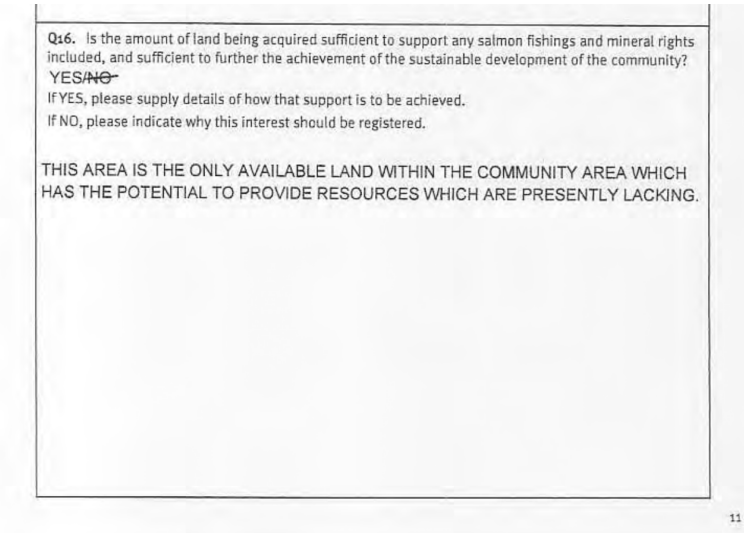
944 N. Hanley, "Measuring Sustainability: A Time Series of Alternative Indicators for Scotland" (1999) 28 *Ecological Economics* 55, 57.

945 SP, OR, RACCE, 7 October 2015.

946 Rio Declaration on Environment and Development, UN Doc.A/CONF.151/26 (Vol.I) 31 I.L.M. 874 (1992).

947 D. Pearce, *Blueprint 3: Measuring Sustainable Development* (London: Earthscan, 1994) pp.15–16.

948 Scottish Government, *Overview of Evidence on Land Reform in Scotland* (Edinburgh: The Stationary Office, 2012) p. 7.



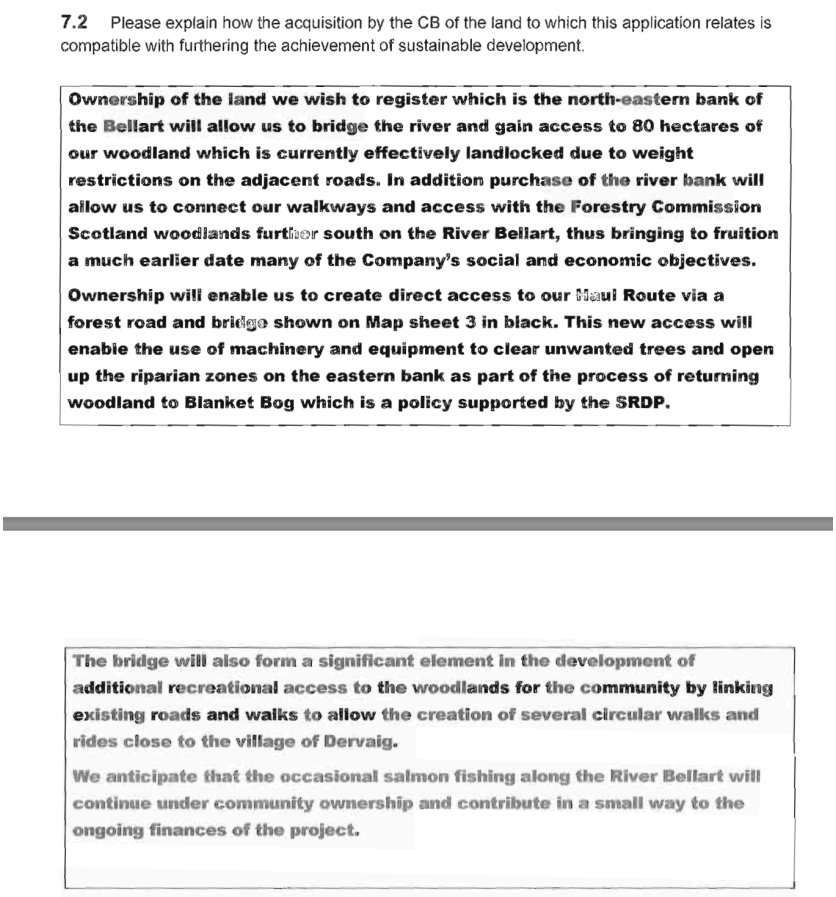
Q16. Is the amount of land being acquired sufficient to support any salmon fishings and mineral rights included, and sufficient to further the achievement of the sustainable development of the community?
YES/~~NO~~
IF YES, please supply details of how that support is to be achieved.
If NO, please indicate why this interest should be registered.

THIS AREA IS THE ONLY AVAILABLE LAND WITHIN THE COMMUNITY AREA WHICH HAS THE POTENTIAL TO PROVIDE RESOURCES WHICH ARE PRESENTLY LACKING.

11

Source: Register of Community Interests in Land, Registration No. CB00006 (Crossgates Community Woodland, Entered 28 September 2004)

While the Scottish Ministers have attempted to articulate a detailed and structured approach to sustainable development over the last twenty years, the near-blank acceptance of such a lax definition of sustainable development in the application procedure does not inspire confidence. A slightly more detailed application can be seen by the North West Mull Community Woodland Company Ltd entered on 28 March 2018.



7.2 Please explain how the acquisition by the CB of the land to which this application relates is compatible with furthering the achievement of sustainable development.

Ownership of the land we wish to register which is the north-eastern bank of the Bellart will allow us to bridge the river and gain access to 80 hectares of our woodland which is currently effectively landlocked due to weight restrictions on the adjacent roads. In addition purchase of the river bank will allow us to connect our walkways and access with the Forestry Commission Scotland woodlands further south on the River Bellart, thus bringing to fruition a much earlier date many of the Company's social and economic objectives.

Ownership will enable us to create direct access to our Haul Route via a forest road and bridge shown on Map sheet 3 in black. This new access will enable the use of machinery and equipment to clear unwanted trees and open up the riparian zones on the eastern bank as part of the process of returning woodland to Blanket Bog which is a policy supported by the SRDP.

The bridge will also form a significant element in the development of additional recreational access to the woodlands for the community by linking existing roads and walks to allow the creation of several circular walks and rides close to the village of Dervaig.

We anticipate that the occasional salmon fishing along the River Bellart will continue under community ownership and contribute in a small way to the ongoing finances of the project.

Source: Register of Community Interest in Land, Registration No. CB00233 (North West Mull Community Woodland Company Ltd, Entered 28 March 2018)

Despite this, as the decision in *Pairc* emphasises, domestic courts remain apprehensive about considering sustainable development in detail, preferring to defer to the Scottish Ministers. Questions remain over the undefined public policy sustainable development constitutes a legitimate aim. Community bodies lack adequate guidance as to whether their proposed application satisfies the requirement. However, the available evidence in the Register of Community Interests in Land shows that the Scottish Ministers are accepted a very low level of detail.

The island of Gigha remains the most prominent recent example of community ownership. However, in 2014 it was reported that the Island of Gigha Heritage Trust was £2.7 million in debt. One farmer was quoted in the Herald stating quite bluntly "it has been a shambles".[949] The problem is that the legislation remains relatively young and limited in its usage. Therefore, using one single example to state that community ownership is inherently un-economical would be naïve. It will

[949] J. Duffy, "A tale of two islands as Gigha dream turns sour" *The Herald* (Glasgow: 23 November 2014).

only really be with time that the economic case for community ownership will become apparent. The problem for the proportionality standard is that it is concerned with the facts before it and cannot wait for an undetermined period of time to assess the validity of the claims. This underlines the limits of assessing the economic rationale for a deprivation, and explains in part why the courts, particularly in Strasbourg, have been deferential to questions of what constitutes a legitimate aim.

The risk remains that unsubstantiated claims are made during the application procedure about the "sustainable" credentials of an application. These claims will be made during the application stage and, if accepted, there are no checks in place to make sure that proposed measures come to fruition.

5.5.2.1 DIVERSIFICATION OF OWNERSHIP AS A LEGITIMATE AIM

It may come to be considered whether the diversification of land ownership is itself a legitimate aim. As Sheriff McSherry noted in *Holmehill*, "[t]he purpose of the Act [LR(S)A 2003] is to increase community ownership in land… The Act should be construed in this light… it should not be isolated from its end purpose".[950] The solicitor Livingstone, while giving evidence to the Scottish Parliament on the Land Reform (Scotland) Bill in 2015, stated that:

> I have to query whether a change in patterns of ownership for its own sake would be regarded as a legitimate aim under the ECHR. I say that, because the fundamental principle that underpins [A1P1] is the principle of private property and that people should not be deprived of their property or have their property rights restricted unless a wider public benefit would be served by doing so. There is a risk in saying that one is entitled to change the ownership of property because that is what one wants to do.[951]

While Livingstone speaks of the "public benefit" in this instance, it is the aim of the rights to buy that is in question. The subtle point Livingstone was trying to convey to the Scottish Ministers was that, to be compatible with A1P1, deprivations must have an underlying rationale beyond merely changing ownership patterns because the Scottish Ministers want to.

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[950] *Holmehill Ltd* (n 787).

[951] SP, OR, RACCE, 7 October 2015, 10 December 2014, col. 42.

The breaking up of large parcels of land oligopolies has been accepted as a legitimate use of the state's power in the US. The US Supreme Court came to consider the validity of distributive land reform in the landmark decision of *Hawaii Housing Authority v Midkiff*.[952] Like contemporary Scotland, for several historical reasons, land ownership in Hawaii was unusually concentrated. On Oahu, for example, 22 landowners owned 72.5% of the fee simple titles. Many of these landowners were hesitant to sell parcels of their property because of potentially large federal tax liabilities. The result was that most people leased, rather than owned, their homes. According to the Hawaii Legislature, this created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes.[953] The Hawaii Legislature enacted the Land Reform Act of 1967.[954] The 1967 Act was intended to remedy the islands' problem of concentrated land ownership as Hawaii sought to correct "certain perceived evils of concentrated property ownership" and to eliminate land oligopolies.[955] The majority in the US Supreme Court accepted the elimination of concentrated land ownership as a legitimate aim. To O'Connor J "regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers, and redistribution of fees simple to reduce such evils is a rational exercise of the eminent domain [compulsory purchase] power".[956]

It is therefore submitted that intervention in existing patterns of landownership to correct market failures, particularly in the case of land oligopolies, will be accepted as a legitimate aim under A1P1. The doctrine of the margin of appreciation and the weight given to the decisions of democratic institutions means that the question of defining a market failure will be left to be primarily determined by the state. As a World Bank Report concluded in 2003, "governments have a clear role to play in promoting and contributing to socially desirable land allocation and utilisation".[957]

5.5.2.2 LEGITIMATE AIM AND COMMUNITY

One of the driving forces behind the sales orders is the aim of promoting or "rekindling" community. It is clear that the initial process can bring communities together. There do, however,

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[952] *Hawaii Housing Authority v Midkiff* (1984) 469 US 299 229 (United States).

[953] Ibid 242.

[954] Ibid.

[955] Ibid.

[956] Ibid p. 266.

[957] K. Deininger, *Land Policies for Growth and Poverty Reduction* (Oxford: OUP 2003) p. x.

remain concerns over who constitutes the "community" and whether the broad definition serves the stated aim of stronger local communities. In January 2018 it was announced that "residents" of Ulva (an island off Mull), had voted to accept a proposed community buyout plan.[958] Of the 401 who were eligible to vote, 163 backed the buyout of the £4.2 million island. Only six people, including the landowner, actually live on the island. The remaining 395 (98.5% of those eligible to vote) live on Mull and are able to vote due to the area being covered by the community body "the North West Mull Community Woodland Company". The money to purchase is currently being sought through fundraising. The landlord, who is a local farmer, will understandably feel aggrieved that his land is potentially being taken from him due to the actions of inhabitants of a neighbouring island. In this example, the concept of community has been turned on its head. Those who do not live on the island are able to manipulate the community right to buy to attempt to buy land on a neighbouring island. It is difficult to hold that this example serves the aim of promoting sustainable communities.

The problems inherent in defining community have already been discussed. The example above serves to illustrate the shortfalls of the existing legislation. However, rural communities, in particular pose a certain set of public policy challenges. The aim of promoting sustainable communities is not narrowly defined. The concept of sustainable communities is tied to the alleviation of population decline, tackling the problems posed by an ageing population, affordable housing and the creation of economic opportunities to stop younger generations being forced to leave. Such measures constitute a legitimate aim. Further, the ECtHR remains unlikely to interfere in such questions of public expenditure and social policy. Therefore, rekindling community and promoting sustainable communities constitutes a legitimate aim under A1P1.

5.5.2.3 LEGITIMATE AIMS AND THE RIGHT TO BUY ABANDONED AND NEGLECTED LAND

The question is whether using compulsory powers to utilise disused or abandoned urban land is perhaps not as radical as it first appears. For example, the Prescription and Limitation (Scotland) Act 1973 recognises that an owner's title may become stale.[959] Provided the land is occupied openly, peaceably and without any form of judicial interference from the rightful owner and

[958] A. Campsie, "Islanders say 'yes' to Ulva buyout in crucial vote" *The Scotsman* (Edinburgh: 9 January 2018).

[959] Prescription and Limitation (Scotland) Act 1973.

possession is founded on a registered or recorded deed that is *ex facie* value, the passage of 10 years will allow title to change hands through positive prescription.[960] The right to buy abandoned and neglected land can be considered in light of the old maxim, *vigilantibus non dormientibus jura subveniunt* (the law protects those who are awake, not those who sleep).

The public policy aims behind the right to buy abandoned and neglected land is similar to the English Empty Dwelling Management Orders ("EDMO") created by the Housing Act 2004, although instead of expropriating the property, the EDMOs resemble a form of compulsory leasing. The factors to be taken into account when considering an EDMO are: that the dwelling has been wholly unoccupied for at least 6 months; that there is no reasonable prospect that the dwelling will become occupied in the near future; and that, if an interim order is made, there is a reasonable prospect that the dwelling will become occupied.[961] In deciding whether to authorise a local housing authority to make an interim EDMO, the tribunal must take into account the interests of the community, and the effect that the order will have on the rights of the relevant proprietor and may have on the rights of third parties.[962]

While highlighting that the public policy behind the right to buy abandoned and neglected land is perhaps not as radical as it first appears, EDMOs remain unknown to most, and have been mostly ineffective in practice due to their limited use. For example, in 2014 only 17 EDMOs were successful, despite reports that 600,000 homes in England were empty.[963]Abandoned and neglected land is most likely commensurable to what is often called "blighted property". The American scholar Becher undertook a detailed study of the expropriation of blighted land in Philadelphia.[964] Becher concluded that the disinvestment and neglect of owners of blighted property legitimised the compulsory acquisition of the land for redevelopment.[965]

The Grand Chamber in *JA Pye (Oxford) Ltd v United Kingdom* considered the English law of adverse possession prior to the Land Registration Act 2002.[966] In this instance, the applicant unsuccessfully

[960] Gretton and Steven (n 22) pp. 22-24.

[961] Housing Act 2004 s. 134(2).

[962] Ibid s. 134(3).

[963] H. Osborne, "Powers to bring empty houses into use 'ignored'" *The Guardian* (London: 11 February 2015)

[964] D. Becher, *Private Property and Public Power: Eminent Domain in Philadelphia* (New York: OUP 2014).

[965] Ibid pp. 9-10.

[966] *Pye* (n 675).

submitted that the loss of ownership by operation of the passing of twelve years, under the principles of adverse possession, and the lack of compensation, was incompatible with A1P1.[967]

The decision in *JA Pye (Oxford) Ltd* is illustrative for the purposes of this thesis as the Grand Chamber gave significant weight to the second paragraph of A1P1 with its specific reference to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".[968] Of particular relevance to the right to buy abandoned and neglected land is that it was observed that "[l]and was a limited resource, and it was in the public interest that it should be used, maintained and improved".[969] However, caution is necessary as Grand Chamber held that adverse possession was compatible with A1P1 by a narrow ten votes to seven.[970] Further, the Court placed significant weight to the period of twelve years required under the English law of adverse possession being "relatively long" and "long-established".[971]

It is submitted that the underlying purpose of the right to buy abandoned and neglected land will satisfy the legitimate aim requirement. However, challenges are likely to focus on the individual decisions of the Scottish Ministers when considering applications. The lesson from *JA Pye (Oxford) Ltd* is that the ECtHR is unlikely to accept short periods of abandonment as justifying interferences under A1P1. Therefore, challenges will conceivably focus the time period required for land to be wholly abandoned and neglected.

5.5.3 CONCLUSIONS ON LEGITIMATE AIMS

It is difficult to make general conclusions as to whether the contemporary rights to buy satisfy the "legitimate aim" test. It is also clear that the domestic courts are willing to take a deontological approach to determine what constitutes a legitimate aim instead of undertaking a more exacting consequentialist approach. It is very difficult to disagree with aims such as "sustainable development", "community empowerment", and "economic development". The diversification

[967] Ibid [36].

[968] Ibid [55].

[969] Ibid [47].

[970] Ibid [79] and [85].

[971] Ibid [83].

of land holdings may also constitute a legitimate aim if such measures are undertaken to remedy "market failures", or even if the market appears to be functioning well.

It is clear from the ECtHR and domestic jurisprudence that the Scottish Parliament is entitled to a broad area of discretion to determine what is a legitimate aim. The level of detail required to justify interference in pursuing a legitimate aim in any given instance remains unknown. It appears reasonable to conclude that under A1P1, in general, the decisions of the Scottish Ministers (due to their democratic credentials) are given significant weight when considering whether the rights to buy have a legitimate aim. As a result, it appears that existing measures would be held to constitute a legitimate aim within the meaning of the proportionality requirement even if the available evidence conflicts with the Government's rhetoric.

If the courts make a substantive comment on the legitimacy of the aim, they risk moving into the traditional domain of democratic institutions. This raises larger constitutional issues about the appropriate role of the judiciary and what constitutes an act that is "manifestly unreasonable". It is submitted that the relationship between A1P1 and Scots rights to buy is helping to expose the prevailing fragilities of the proportionality test. That being so, it is only through the structured, rule-based four-part proportionality standards that some form of consistency is possible. Without such a framework an even greater risk of *ad hoc* judicial decision-making would be possible.

5.5.4 PROPORTIONALITY PART 2: RATIONALLY CONNECTED TO THAT AIM

The second test for determining proportionality is whether the legitimate aim, as examined in part one of the test, is "rationally connected to that aim", and whether the legitimate and important goals are logically "furthered" by the means adopted.[972] The principle involves a question of balance between competing interests. The Scottish Ministers have a burden to convey that the restriction on A1P1 is due to a pressing social need. The Ministers must show that the legislative means adopted were no greater than necessary.[973] As discussed in chapter three, the concept of necessity should not be equated to indispensability. It does, however, underline the requirement of some form of societal goal or public good as part of the balancing exercise.

[972] *Mellat* (n 781) [92].

[973] *R v Shayler* [2003] 1 AC 247 [59] (HL).

The question is whether the introduction of the four community rights to buy and the two agricultural tenant's rights to buy are rationally connected with the legitimate aims outlined above. Caution is necessary, as it is dangerous to make sweeping statements about the rights to buy. Their primary aims are, however, broadly the same (if somewhat poorly defined): sustainable development and the diversification of ownership. In relation to the crofting community right to buy, this includes strengthening the crofting community and, concerning the agricultural tenants' right to buy, includes increased security of tenure and a more vibrant and sustainable tenanted sector.

Agricultural holdings reforms are being undertaken in the belief that they will increase security for tenants and facilitate a more vibrant and sustainable tenanted sector. The Review of Agricultural Holdings Legislation states that: "The Scottish Government's vision is for a Scottish tenant farming sector that is dynamic getting the best from the land and the people farming it, and provides opportunities for new entrants, forming part of a sustainable future for Scottish farming".[974] These aims are important, as the tenanted farming sector is vulnerable to wider economic forces, with many tenant farmers relying significantly, or wholly, on subsidies to make ends meet. The question is then whether the agricultural tenant's right to buy and the introduction of the sale when the landlord is in breach are "rationally connected" to these aims.

The result of these reforms to date has been a lesson in the risks of unintended consequences as the reforms have instead come to harm Scotland's agricultural tenants significantly.[975] The increase in security of tenure and the possibility of a pre-emptive right to buy has made landowners increasingly wary of entering into agricultural tenancies. In response to the AH(S)A 2003 it was estimated that over three hundred dissolution notices were served in one evening alone.[976] The on-going controversy surrounding *Salvesen v Riddell* and *McMaster v Scottish Ministers* highlights the many problems that have been caused.[977] The consequences are plain to see: "Scottish tenant farmers face eviction due to legal error," ran a recent headline in The Scotsman.[978] For the agricultural

[974] Scottish Government, *Review of Agricultural Holdings Legislation* (Edinburgh: The Stationary Office 2014) para 4.

[975] G. Dunlop, "Food for thought on tenant farming" *The Press and Journal* (Aberdeen: 13 August 2016).

[976] L. Riddoch, "Mistreating tenant farmers and trying to duck the fallout shames out nation" *The National* (Glasgow: 20 October 2016).

[977] *Salvesen* (UKSC) (n 11); *McMaster* (IH) (n 5).

[978] The Scotsman, "Scottish tenant famers face eviction due to 'legal error'" (Edinburgh: 28 November 2016).

tenancy sector in Scotland, who were promised great things before the passing of the AH(S)A 2003, the results have been less favourable.

While questions remain over the exact parameters of the objectives of the Scottish Ministers, the economic consequences of fragmentation must be considered. There is evidence that by transferring land from large estates to family farms you bring idle lands into production, and; increase productivity levels.[979] There is, however, conflicting evidence that large-scale agriculture promotes great efficiency.[980] A 2003 World Bank study showed the nations which had worked towards a more equitable distribution of landowners between 1960 and 2000 had achieved growth rates two to three times higher than those where land distribution was less equitable.[981] However, other studies have shown contradictory results.[982] The most comprehensive study commissioned by the Scottish Government concluded that "even where fragmentation had occurred, the current owners could not conclude that the ownership change and fragmentation had actually led to positive outcomes for the wider rural communities in their area".[983] The same report concluded that "it is too simplistic to conclude that scale of land ownership is a significant factor in the sustainable development of communities".[984]

This is further compounded by the fact that the rights to buy have introduced a new level of uncertainty for landowners and practitioners. Landowners will be aware of agricultural tenants' rights. However, knowledge of community "connections" and intentions are more difficult to discern. This is undoubtedly complicated by the late registration procedure. This may only become apparent to landowners when they receive a letter from the Scottish Government prohibiting disposition, while the merits of the late application are considered. The initial ministerial decision process usually takes over two months, adding further time and costs to sales. This introduces inefficiencies into the market and can divide communities and harm the relationship between

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979 D. Palmer et al "Towards Improved Land Governance" (2009) FAO Land Tenure Working Paper 11, p. 31 <http://www.fao.org/3/a-ak999e.pdf> [accessed 1 June 2018].

980 A. Banerjee, "Land Reforms: Prospects and Strategies", (1999) MIT, Department of Economics Working Paper Series, Working Paper 99–24, pp. 1–5. <http://dspace.mit.edu/bitstream/handle/1721.1/63873/landreformsprosp00bane.pdf;sequence=1> [accessed 1 June 2018].

981 O. De Schuter, "The Emerging Human Right to Land" (2010) 12 *International Community Law Review* 303, 327-328; K. Deininger, *Land Policies for Growth and Poverty Reduction: World Bank Policy Research Report,* (Oxford: OUP 2003).

982 K. Griffin, "Poverty and the Distribution of Land" (2002) 2 *Journal of Agrarian Change* 279.

983 Thomson (n 17) p. 63.

984 Ibid.

landlord and tenant. In doing so, the rights to buy can be counterintuitive and actually harm sustainable development and divide communities.

There is, therefore, evidence that the right to buy is rationally connected to the alleviation of poverty and economic growth. The problem is that there is also conflicting evidence, and the Scottish Ministers have been left to assess the validity of the evidence presented to them. The courts in this instance are often asked to balance conflicting factors that are frequently based on future hypothetical situations. These hypotheticals are unverifiable, and the court is left to make a determination in areas that it perhaps lacks the expertise to determine adequately.

The broad margin of appreciation and the importance of deference to democratic institutions means that the courts' ability to determine such questions based on economic or other evidence is limited. This highlights the questions of whether the rights to buy are "rationally connected" to the aims of the Scottish Ministers.

5.5.4.1 CONCLUSIONS ON "CONNECTED TO THAT AIM"

As discussed in chapter three, the first two parts of the proportionality tests are relatively low hurdles. For example, if the breaking up of large landholdings is a legitimate aim, then a measure such as Lenin's 1917 "Decree on the Land", under which "[l]anded proprietorship is abolished forthwith without any compensation" would be rationally connected to that aim.[985] Such a measure would not satisfy the third and fourth proportionality requirement, but the fact that such a measure could potentially satisfy parts 1 and 2 highlights the significance of the margin of appreciation given to contracting states. There remains considerable disagreement as to whether the rights to buy are rationally connected to the aims of the Scottish Ministers. However, it is submitted, that outside of exceptional circumstances, ECtHR and the domestic courts are unlikely to hold that contemporary rights to buy do not satisfy parts 1 and 2 of the proportionality test.

5.5.5 PROPORTIONALITY PART 3: WHETHER THE AIM COULD HAVE BEEN ACHIEVED BY A LESS INTRUSIVE MEASURE

It has to be asked whether the existing rights to buy pose disproportionate "risks", in terms of capital expenditure, economic perils and political and judicial time. Part 3 of the proportionality standard asks whether these "risks", combined with the severity of the interference on individual

[985] See V. I. Lenin, "On the 'Unauthorised Seizure' of Land: Flimsy Arguments of the Socialist Revolutionaries" in *Lenin Collected works 24* (Moscow: Progress Publishers 1964) pp. 449-454.

rights, could be reduced through the utilisation of alternative measures, while at the same time retaining the same desired outcomes.

The domestic courts' willingness to consider whether the aim could have been achieved by a less intrusive measure exposes the distinction between the obligations which the UK accepted by accession to the ECHR and the duties under domestic law which were imposed upon public authorities by the HRA.[986] The result is significant as it shows that an interference may be considered incompatible with a Convention right under the HRA but within the state's margin of appreciation by the ECtHR.[987]

The margin of appreciation, and judicial deference, have a significant role to play in part 3. As Lord Armstrong observed in the Outer House decision of *Accountant in Bankruptcy v Walker*, the courts should be loath to interfere unless the choice of Parliament is manifestly without reasonable justification.[988]

The availability of alternative solutions is, therefore, a factor in determining proportionality, but it is not decisive. There are several possible "solutions" to the problems identified in part 1 of chapter one. Speaking at a conference at George Mason University, just south of Washington DC, in May 2017, I was asked by Brian Grindall, a practising American lawyer and lecturer at Georgetown University, why the Scottish Government did not just "tax the hell" out of landowners?[989] The simple answer, was that Scottish Ministers had limited devolved competencies in this area.[990]

The question to which Grindall was alluding was whether the objectives of land reform could have been achieved through fiscal measures in a less intrusive manner. The use of taxation was recently discussed in *R (British American Tobacco UK Ltd) v Secretary of State for Health* where the claimants submitted that the Secretary of State had failed to prove that standardised packaging was proportionate because the evidence does not show that there are no equally effective but less restrictive alternatives.[991] The claimants submitted that it is obvious that taxation is more

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[986] Murdoch and Reed (n 62) p. 3.

[987] *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 (HL) [29]-[39] and [50].

[988] *Accountant in Bankruptcy v Walker* [2017] CSOH 78, 2017 SLT 890 [29].

[989] D. Maxwell "Scottish Land Law Reform: Lessons from *Hawaii Housing Association v Midkiff* (1984)" (George Mason University, Legal Colloquium on Regulatory Issues in Contemporary Land Law, 16 May 2017).

[990] Scotland Act 2012.

[991] *British American Tobacco* (n 665).

effective.[992] In this instance, the court chose to dismiss these arguments as the competent authorities enjoyed a "wide margin of appreciation" which extended to: (i) the need for the legislation (ii) its aims, and (iii) its effect.[993] Citing *James v United Kingdom*, Green J noted that it should not intervene unless it was "manifestly unreasonable and imposed an excessive burden on the person concerned".[994]

This raises several important questions, and once again asks us to consider what the Scottish Ministers are aiming to achieve. While giving evidence to the Scottish Parliament Rural Affairs Committee, Bovey QC noted the Faculty of Advocates' concerns about the proportionality of the right to buy when the landlord is in breach. He argued that to force sale where a landlord "is in breach" is comparable to using a sledgehammer to crack a nut, as in doing so you "destroy the nut" or eliminate the landowner's title and "so defeat the purpose" of promoting good land management.[995] To Bovey:

> If a landlord is in breach of his obligations, you must ask whether the only way in which you can enforce those obligations is to buy his property compulsorily or whether it would be possible to enforce them by, for example, allowing the tenant to withhold his rent and to use that money to repair the breaches of which the landlord is guilty.[996]

The right to buy where the landlord is in breach does pose a particular set of challenges. The right is draconian, and while it is intended to be a measure of last resort, questions remain unanswered as to where a landlord who is allegedly in breach will be given time to remedy the Land Court order to remedy the beach.[997] It is submitted that it would be disproportionate for an isolated breach, or even a series of breaches, automatically to allow the tenant an absolute right to buy.

It is argued that the right to buy when the landlord is in breach may constitute a disproportionate interference if other remedies are available. It must be remembered that under the AH(S)A 1991,

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[992] Ibid 1182 [651].

[993] Ibid [764].

[994] *James* (n 61) [46] and [50].

[995] SP, OR, RACCE, 7 October 2015.

[996] Ibid col. 27.

[997] Ibid col. 53.

agricultural tenants already enjoy near indefinite security of tenure.[998] As previously noted, Lord Diplock observed, "proportionality in plain English means you must not use a steam hammer to crack a nut, if a nutcracker will do".[999] The sale when the landlord is in breach serves a legitimate aim, promoting good land management. However, to expropriate the land for an alleged breach (if we follow the analogy of Lord Diplock) does not just smash it, but transmutes in the sense of being converted to a right to monetary compensation, and all meaningful use of the land is extinguished.

The right to buy abandoned and neglected land also raises critical questions of alternative measures. What the right does is impose a utilitarian obligation on landowners to utilise "wholly abandoned or neglected land". The ownership rights in this instance are extinguished in their totality. Alternative mechanisms to utilise (or coercively force utilisation or sale) are possible. The Scottish Greens have proposed a tax on vacant and derelict land and other reforms.[1000] These would require the owner of abandoned or neglected land to undertake a cost-benefit analysis. The underlying rationale is that this forces owners to utilise their land. This proposal is also coercive, but it does not completely extinguish Lord Diplock's fictitious nut — it merely reduces the land's economic value.

When attempting to answer whether the stated policy aims could have been achieved through less intrusive measures, it is difficult to make generalisations about the reform of land law. If the stated aim is simply the diversification of land holdings, it is difficult to conceive of measures that are less intrusive. Indeed, if the policy goal of 1 million acres is to be realised, more intrusive measures are probably necessary. If the stated aim is sustainable development or environmental protection, then the measures are overly intrusive, and the policy goals could probably be achieved through measures short of extinguishing all of the landowner's rights or smashing Lord Diplock's fictitious nut.

Once again, the reform of Scots land law is exposing the limits of the proportionality test and the limits of the judiciary in determining whether such a measure could have been achieved by a less restrictive means. The ECtHR has tended to offer contracting states a wide margin of appreciation. The judiciary is being asked to consider future hypotheticals and questions with underlying

[998] AH(S)A 1991.

[999] *R v Goldstein* [1983] 1 WLR 151 [155] (HL).

[1000] L. Brooks, "A new dawn for land reform in Scotland" *The Guardian* (London: 17 March 2016).

economic and social rationales that they are most likely not best placed to answer. Not only is ascertaining such information an inherently subjective and expensive endeavour, but it also risks the judiciary trespassing into the traditional domain of the legislature.

5.5.5.1 GRANULARITY

One critical question that remains unanswered is how fixed the analysis under A1P1 should be and whether the judiciary should consider particular cases on their merits or should instead look at the overall impact of the legislation. As noted in the introductory chapter it is important to emphasise that proportionality operates at two different levels.[1001] First, at a macro-granular level proportionality considers the underlying public policy and wording of the measure. Macro-granularity is imbued with the doctrine of the margin of appreciation and the doctrine of judicial reference. Micro-granularity requires the court to consider the distinct facts before the court and the weight to be given the competing interests of the parties.

The ECtHR, especially in its earlier decisions, appears to have been primarily concerned with the broader picture at a macro level.[1002] Domestic courts appear more willing to consider the rationality of individual evidence. In *Mott*, the Supreme Court based its decision almost entirely on a micro-granular analysis of the personal circumstances of Mr Mott at the expense of environmental regulations.[1003]

The problem is that a macro granularity ignores the personal circumstances of landlords and landowners. It is obvious that the effect of contemporary rights to buy will have differing consequences when applied in their various forms. For example, when considering a right to buy abandoned and neglected land, should the Scottish Ministers take a micro approach and give weight to the individual circumstances of the landowner? Would it be relevant if the landowner had left the land wholly abandoned and neglected as they had been acting as the primary carer of a disabled or ill relative and, during this period, lacked the time and resources to actively manage the land? Or on the contrary, should the Scottish Ministers favour a macro-granular approach and look at the overall impact of the right to buy on the community and ignore the circumstances of the landowner? It is submitted that this example highlights the problem of granularity and that the

[1001] See para 1.5.4 above.

[1002] *James* (n 61).

[1003] *Mott* (UKSC) (n 688).

Scottish Ministers and judiciary should not ignore the individual circumstances of the landowner when considering part 3 of the proportionality standard.

The lesson for Scots land reform is that future challenges to rights to buy will most likely focus on the micro-granularity of the evidence that led to the Scottish Ministers' decisions. This will focus on the individual circumstances of the landowner and also the merits of the community's application to fulfil the legislative requirements, which include the furthering of sustainable development. As already discussed above, the Scottish Ministers appear to have set the standard of detail relatively low. It is highly likely that a challenge to a contemporary right to buy on the level of detail undertaken during the application process will offer a possible avenue for litigators to challenge rights to buy under A1P1. This is not a challenge to the compatibility of the legislation, but instead looks at how it has been applied by the Scottish Ministers.

5.5.5.2 CONCLUSIONS ON LEAST INTRUSIVE INTERFERENCE

The above analysis has shown that serious questions remain unresolved as to whether less restrictive measures could be utilised to attain the Scottish Ministers' desired outcomes. The differing aims articulated by the Scottish Ministers, and the difficulty in defining what are often general public policy statements or aspirational goals, clouds the analysis. The clearest example of where the aims of a right to buy could have been achieved through a less intrusive measure is most apparent in relation to the new right to buy where the landlord is in breach. While not yet in force, it is submitted that this draconian measure, which intends to facilitate good husbandry and land management, goes too far in that is does not resolve the dispute between the landlord and tenant but simply extinguishes the rights of the landlord in their totality. Due to the closer nexus of domestic courts, it is submitted that they should consider whether the aims could have been achieved through a less intrusive measure to comply with their obligations under the HRA.

5.5.6 PROPORTIONALITY PART 4: STRICTO SENSU AND THE FAIR BALANCE TEST

It is a firmly established test that any interference must achieve a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's

fundamental rights.[1004] To the ECtHR, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[1005]

The availability of compensation is an important factor (often the critical factor), in the assessment of proportionality. There is a presumption in favour of compensation where property has been expropriated. As already shown, there is a deliberate absence of an explicit compensation requirement in the text of A1P1. The ECtHR has come to hold that the deprivation of property without compensation will be a disproportionate interference.[1006] The ECtHR has only been willing not to consider compensation as a critical factor in a handful of unique cases, such as the unification of Germany.[1007] Outside of such cases, if the amount paid is deemed to be "manifestly disproportionate",[1008] this will serve as strong evidence towards a disproportionate interference.[1009] In practice, the ECtHR has been apprehensive to make inquiries into the adequacy of an award of compensation.[1010]

The Scottish Government has included compensation requirements in the rights to buy.[1011] The provisions require the value of land to be determined by a suitably qualified and independent "valuer".[1012] The valuer is to act on behalf of neither the community body nor property owner and serves only as "an expert and not as an arbiter".[1013] The "market value" is to be determined by reference to the "open market" value as between a willing seller and buyer, any depreciation in the value of other land or interests belonging to the targeted property owner, and "any amount attributable to any disturbance to the seller which may arise in connection with the transfer".[1014] The amended LR(S)A 2003 and the LR(S)A 2016 allows community bodies and landowners to appeal for a complete reassessment of the compensation valuation made by the independent valuer

[1004] Barak (n 771) p. 340.

[1005] *Sporrong & Lönnroth* (n 540) [50].

[1006] *Lithgow* (n 588) [120].

[1007] *Jahn* (n 823) [117].

[1008] *Lithgow* (n 588) [90].

[1009] *Jokela v Finland* (2003) 37 EHRR 26 [65].

[1010] *Holy Monasteries v Greece* (1994) 20 EHRR 1 [74].

[1011] Lovett, "Towards Sustainable Community Ownership" (n 40).

[1012] LR(S)A 2016 s. 65; s. 56(1)(a); and s. 56 (1)(b).

[1013] LR(S)A 2003 s. 97S(2); LR(S)A 2016 s. 65(2).

[1014] Ibid s. 97S(5); LR(S)A 2016 s. 65(5).

to the Lands Tribunal for Scotland.[1015] The prospect of an appeal also risks a greater financial burden being imposed on landowners and communities that may be unaffordable for one or both parties.

The initial valuation is without any reference to the landowner. As a result, landowners are unable to claim for what the Fennell calls "uncompensated increments".[1016] First, the legislation does not include any reference to the landowner's subjective valuation of the land. Second, the opportunity to be compensated for any post-transfer surplus, or re-development value, is omitted. Third, the owner's autonomy, which is violated by a non-consensual expropriation, is also ignored.[1017] This is of particular relevance to this thesis as it must be considered whether the compensation requirements satisfy the fair balance test under A1P1. However, when compared to existing principles of compensation under compulsory purchase law, these provisions are not as radical as they first appear. Further, the judiciary has previously appeared deferential to questions of value in relation to land reform. Lord Malcolm observed in *Pairc Crofters Ltd v Scottish Ministers* that reasonable compensation "will go a considerable distance towards satisfying the requirement for a fair balance and the avoidance of a disproportionate" interference.[1018]

The problem is that the concept of the open market automatically implies a willing seller and a willing buyer, both of whom in such forced sales are a hypothetical abstraction.[1019] This can cause overcompensation as well as under compensation. In instances of overcompensation, the ECtHR appears disinterested. The Grand Chamber in *JA Pye (Oxford) Ltd* observed that "the possibility of 'undeserving' tenants being able to make 'windfall profits' did not affect the overall assessment of the proportionality of the legislation".[1020] Further, there are already isolated instances where the fair balance may have been overtly in favour of the existing owner. A notable example is Scottish Water, who were "very pleased with the valuation" of an underground redundant water tank in Silverburn.[1021] Thus, the overall process for determining just compensation remains a task fraught with operational complexity.

[1015] LR(S)A 2003 s. 97W; LR(S)A 2016 s. 70.

[1016] L. Fennell, "Taking Eminent Domain Apart" (2004) *Michigan State Law Review* 957, 958-959.

[1017] J. Lovett, "Towards Sustainable Community Ownership: A Comparative Assessment of the Community Right to Buy" (Cambridge Centre for Property Law Conference, Cambridge, 26 May 2018).

[1018] *Pairc Crofters* (n 43) [105].

[1019] *Gray v Inland Revenue Commissioners* [1994] STC 360 [372] (CA).

[1020] *Pye* (n 675) [83].

[1021] L. Kermack, "Coping with Rights to Buy – Part 1" (2006) 46 *The Bulletin of the Agricultural Law Association* 8, 9.

5.5.6.1 PROPORTIONALITY STRICTO SENSU AND PROPERTY AS A LIABILITY RULE

Part 4 of the proportionality rule has come to accept that the individual's rights to the peaceful enjoyment of possession can be justifiably deprived if compensation is paid. As noted in the introductory chapter, property is a limited right. The presumption against interference imposes certain obligations on the judiciary when assessing the proportionality of an interference *stricto sensu*. This has been done by the payment of compensation which is determined to be recompense for the loss of individual rights.

Using the theoretical foundations of Calabresi and Melamed, property rules can be described as the ability of a recognised owner to "just say no" to a prospective purchaser. To Calabresi and Melamed "what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take an entitlement to private property from the holder unless the holder sells it willingly and at a price at which he subjectively values the property".[1022] Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.[1023] The term "liability" rule is borrowed from American tort law to describe how property owners only have a liability rule to the protection of monetary compensation against the government with its power of eminent domain.[1024]

It is argued that Scots land law reform is exposing the inherently subjective nature of property rules and liability rules but also serves to illustrate the misplaced existing conceptions of "absolute" rights to property in land. It is posited that proportionality *stricto sensu* brings into view the reality that absolute ownership of land, does not exist. Instead, owners hold a qualified entitlement that can be denigrated to a liability rule or claim for compensation when democratic institutions (exercising their powers in conformity with the rule of law, the public interest, and in a proportionate manner) see fit.

[1022] M. Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Columbia Law Review* 1667.

[1023] G Calabresi and A D Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089, 1092.

[1024] Ibid.

The right to property is therefore not a legal entitlement to "sole and despotic dominion"[1025] over an area of the earth, but a qualified right that has its ultimate foundation in a claim for monetary compensation for the value of those legal rights at market value. The rationale for the market value remains critical as it attempts to prohibit proportionality *stricto sensu* being manipulated for egalitarian purposes. This gives us the underlying justification for the payment of compensation, but it does not resolve what constitutes just compensation and what the ECtHR is willing to accept as such.

5.6 THE COST OF REFORM

Funding community ownership remains one of the primary limiting factors. Where a community is unable to afford the purchase and has taken "all reasonable measures" to obtain independent financing, the Scottish Ministers can decide that it is in the public interest to pay a grant to fund the purchase.[1026] The majority of community acquisitions have been through such grants. The funding has come from a combination of the publicly funded Scottish Land Fund and Growing Community Assets fund and through partnerships with the Big Lottery Fund, which is a non-departmental public body reasonable for distributing funds raised by the National Lottery.[1027] The burden of land reform is therefore firmly placed on the taxpayer directly through public funding and indirectly through the National Lottery.

The principle of equivalence is unlikely to satisfy those who are currently calling for "radical" land reform and redistribution in Scotland. The reality is that land reform is prohibitively expensive and to undertake the sort of mass transfers proposed is unaffordable. For example, The *Knight Frank Scottish Farmland Index* 2016 reported that the average price of land in Scotland per acre was £4,223, with "good arable land" averaging £9,050.[1028] An additional 437,770 acres has to come into community ownership to achieve the target of having one million acres of land in community ownership by the end of 2020.[1029] If we take the average price of land sold in Scotland in 2016, the total cost has the potential to be around £1,848,702,710. If the land bought is "good arable land" the cost would be closer to £3,961,818,500 and even the lowest quality and cheapest land simply

[1025] W. Blackstone, *Commentaries on the Laws of England Book II*.

[1026] LR(S)A 2003 s. 97U(1)-(2); LR(S)A 2016 s. 68(1)-(2).

[1027] Big Lottery Fund, "Scottish Land Fund" <https://www.biglotteryfund.org.uk/funding/programmes/scottish-land-fund> [accessed 1 June 2018].

[1028] A. Shirley (ed) *Scottish Farmland Index H2 2016* (London: Knight Frank Rural Research, 2017).

[1029] Scottish Government, "Estate of Community Owned Land in Scotland 2017 Experimental Statistics" (n 78) p. 1.

defined as "Hill" which averages £673 per acre, makes the total cost £294,619,210. These are very general figures, but they do emphasise the sheer cost of undertaking land reform through rights to buy.

It is nearly impossible to see where this sort of money would come from. The Scottish Government's Draft Budget for 2018-2019 has budgeted £404,900,000 for Environment, Climate Change and Land Reform.[1030] The title is slightly misleading as within this category £152 million is allocated to Environmental Services and £113.5 million to Scottish Water. Land reform has only been allocated £17.1 million in the draft budget.[1031] This is still a significant figure, but it will come as a surprise to few that the aim of 1 million acres by 2020 is impossible. While funding can be sought from other channels, including charity, donations and fundraising, it is unlikely that such endeavours would be able to fill this financial void.

5.6.1 COMPENSATION BELOW MARKET VALUE

It appears reasonable to conclude that Scotland cannot currently afford land reform on the scale it has proposed, and the existing reforms have already been undertaken by shifting the financial burden to the taxpayer.[1032] As such, the compensation requirement will limit the full effect of "radical" reforms. However, the Scottish land question has often resulted in calls for expropriations below market value or in extreme instances of mass confiscation.[1033] The question then turns to whether compensation can be paid below market value or removed in its entirety.

As illustrated in chapter two, the introduction of a compensation standard was one of the most controversial elements of the drafting of A1P1. Britain's Labour representative Nally argued that "the basis of Europe's fight for survival is a struggle for the subordination of private property to the needs of the community".[1034] The representative went further and suggested that by protecting property, they would be defending a system in which a "tiny handful of people own the means by which millions of others live".[1035] This has direct parallels with the land reform movement in

[1030] Scottish Government, *Scottish Budget: Draft. Budget 2018-19* (Edinburgh: The Stationary Office 2017) p. 8.

[1031] Ibid. pp. 138-139.

[1032] S. Johnson, "Taxpayers 'face compensation bill for SNP land reform" *The Telegraph* (London: 28 January 2015).

[1033] Evans and Hendry (n 95).

[1034] TP, vol. II, pp. 74, 78, and 80.

[1035] Ibid p. 80.

Scotland as many have come to question why the individual rights of landowners should trump the Scottish Ministers' egalitarian reforms.

The early jurisprudence shows that the ECtHR was not concerned with the fair balance test and questions of compensation, but simply whether the court must restrict itself to supervising the lawfulness and the purpose of the restriction in question.[1036] This was expanded upon in the famous trio of *Marckx*, *Sporrong* and *James* to include questions of proportionality.[1037] The early decisions of the ECtHR appear to show that there was initially no guarantee of a right to full compensation. In *Lithgow v United Kingdom* is was observed that a legitimate public interest "may call for less than reimbursement of the full market value".[1038] The Convention is a living instrument and later cases have come to hold that A1P1 would be largely illusionary and ineffective in the absence of any equivalent principle. The payment of compensation at fair market value has been consistently held as critical to the question of whether the fair balance has been struck.[1039]

The ECtHR has held that states are unable to justify a lack of compensation or under compensation on the grounds of limited resources. Even the bankruptcy of a local authority has not been held to make under compensation permissible.[1040] Therefore an argument cannot be made that reducing compensation from fair market value is justifiable as the cost of facilitating land reform imposes a prohibitively expensive financial burden upon the state.

What is observable in this shift is a tension between conceptions of property as a "liberal" right or conversely as a "social democratic right".[1041] Conceptions of property as a "liberal" right find their foundations in the entitlement of individual liberty in the face of state intervention.[1042] Central to liberal theory is the importance of the individual's ability to freely determine the use and disposal

[1036] *Handyside* (n 578) [62].

[1037] *Marckx* (n 58); *Sporrong & Lönnroth* (n 540); *James* (n 61).

[1038] *Lithgow* (n 588) [121].

[1039] *James* (n 61) [54].

[1040] *Burdov v Russia* (2004) 38 EHRR 29 [41].

[1041] Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (n 474).

[1042] C. Rose, "Privatization – The Road to Democracy?" (2006) 50 *Saint Louis University Law Journal* 691.

of property. Interference is therefore only permissible in a narrow set of circumstances and will be deemed to be an unjustifiable invasion of liberty if the owner is left worse off.[1043]

The payment of compensation for deprivations of property is not a new phenomenon in the UK. The House of Lords noted in *Attorney-General v Nissan* that "even under the Stuarts there is no case supporting that there might be seizure by the Crown without a right to compensation".[1044] Therefore, a liberal conception of property would most likely exclude the possibility of the Scottish Government legislating in a manner that does not satisfy the principle of equivalence. As Lord Nichols observed in *Waters v Welsh Development Agency* "in a modern democratic society... hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation, that is axiomatic".[1045]

5.6.2 THE SOCIAL DEMOCRATIC RIGHT TO PROPERTY

Standing opposed to the liberal theory are those who conceive of property as a "social democratic right".[1046] These theorists believe that state interference with property is not only permissible but expedient in the face of the many basic "needs" that are left unsatisfied by the free market and capitalism.[1047] Therefore, where the public interest directs, full compensation is not necessary; instead, the broader reciprocity of societal advantage should be the key consideration. A social democrat would argue that the legislature has an important role in determining the value of property, and that the legislature may decide that the public interest demands that some values that are realisable in a private transaction are not compensable on expropriation.[1048]

If this theory is applied to Scots land law reforms, it would forward that the necessity of land reform and the democratic mandate of the Scottish Ministers allows for land reform to bypass the normal principles of equivalence.[1049] Added to this is the question of whether market value constitutes the fair or true value of property. To some theorists, the removal or reduction of full compensation is permissible when it is undertaken in the public interest and promotes ethically

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[1043] Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (n 474) 1056.

[1044] *Attorney-General v Nissan* [1970] AC 179 [193] (HL).

[1045] *Waters v Welsh Development Agency* [2004] 1 WLR 130 [1] (HL).

[1046] Alexander, Penalver, Singer and Underkuffler (n 50).

[1047] Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (n 474) 1058.

[1048] Ibid 1078.

[1049] SP, OR, 16 December 2015, col. 69.

permissible policies.[1050] In such circumstances, it is considered expedient to subvert the economic status quo in the pursuit of worthy social causes.[1051] However, the possibility of reducing compensation does not automatically mean the removal of the compensation requirement in its totality.

Dagan argues that we should avoid the extremes between the libertarian concept of all interferences requiring compensation for every "taking" and conceptions of compensation that hold that landowners should bear the individual burden of social change.[1052] To Dagan, when considering compensation, it is important: to consider the *nature of the resource*, to determine the personhood value of the property and the *social context* in which land is owned; to establish the type of human relationship the existing rights structure takes and regulates. Dagan submits that the legislature should create a bright line rule — a formula of sorts — that determines when partial compensation is due. These three proposed rules are:

1) When the beneficiary of the public project at hand is one's local community and the expropriated land has been held as an investment, meaning the owner held it as fungible property, compensation will be calculated as only x% (say 80%) of the fair market value.
2) By contrast, when the land is expropriated as part of a larger (e.g., regional or state) governmental project and has previously served its owner for constitutive purposes (a home or maybe also a farm or small business), full compensation (fair market value) will be awarded.
3) In between these two extreme categories are cases in which constitutive land is expropriated for purposes that benefit its owner's local community, and cases in which the use of fungible land benefits broader society. These intermediate types of cases should both trigger the award of intermediate measures of recovery: y% of the fair market value where $x\% < y\% < 100\%$ (say 90%).[1053]

In the context of Scottish land reform, there is the possibility of applying this analysis. It would hold that when expropriating land from owner-occupier farmers, and even large-scale resident

[1050] E. Baker, "Property and its Relation to Constitutionally Protected Liberty (1986) 134 *University of Pennsylvania Law Review* 741, 765.

[1051] H. Dagan, "Reimagining Takings Law" in G. Alexander and E. Peñalver, *Property and Community* (Oxford: OUP 2010).

[1052] Ibid pp. 39-55.

[1053] Ibid p. 53.

landlords, full compensation should be awarded. It would propose that in instances where land is held (for example) by an anonymous offshore trust, or as part of an international investment portfolio, the nature of the resource and the social context in which it is held would allow for a reduction in compensation below market value if this was necessary to serve a public project and benefited the local community. This would allow the compensation requirement to be used for distributional purposes. It makes it more expensive to expropriate from "ordinary citizens" than it is to expropriate property from owners of what Dagan terms "fungible property", whom he notes are typically real-estate holding corporations of wealthy individuals.[1054] Significantly, for the Scottish Ministers' programme of having 1 million acres in community ownership, Dagan argues that such a system would incentivise large-scale purchases and balance the political and economic power relations between small domestic owners and large-scale corporations whose social connection with the land is minimal.

The problem with the deadlocked debate over compensation and land reform in Scotland is that both sides have become entrenched in their positions. It is impossible to reconcile claims that land should be nationalised or expropriated with no (or minimal) compensation when juxtaposed against those who submit that fair market value alone does not constitute acceptable compensation. Dagan did not set out his rules with Scotland in mind, but it is submitted that they do offer an alternative. If the nature of the resource and the social context is considered, it does become apparent that an argument can be made that compensation can be reduced in certain very confined circumstances.

There are notable examples of this in the past. The Uthwatt Committee on Compensation and Betterment set up during the Second World War discussed the purpose of compensation detail.[1055] To stop land speculation and profiteering during the reconstruction of many towns and cities after the Blitz, the Uthwatt Committee ordered that the value of land should be set as its pre-war value. In this instance, Parliament chose to limit compensation as it was considered expedient to meet the pressing social need for reconstruction.[1056] Support for this view is observable is certain contracting states. The 1973 Irish Report of the Committee on the Price of Building Land asserts that "[t]he alleged right of landowners to get the full market price for something in limited supply

[1054] Ibid p. 54.

[1055] *Expert Committee on Compensation and Betterment, Final Report* (London: Stationary Office 1942).

[1056] Simpson (n 551)

(a right which we believe does not exist) is not consistent with the common good".[1057] In 1980 the Italian Constitutional Court held that, while compensation must not be "negligible" or "symbolic", this should not be equated with "market value".[1058]

The Strasbourg Court famously held in *Jahn v Germany* that the "exceptional circumstances" of German reunification were taken as a relevant factor in their holding that the principle of equivalence could be ignored.[1059] In *Urbárska v Slovakia* the Strasbourg Court observed that:

> While it is true that in many cases of lawful expropriation only full compensation can be regarded as reasonably related to the value of the property, A1P1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Less than full compensation may also be necessary a fortiori where property is taken for the purposes of fundamental changes of a country's constitutional system or in the context of a change of political and economic regime.[1060]

This appears to support a social democratic view of compensation, but a note of caution is necessary. The economic rationale for reducing or removing compensation remains disputed. To some, a reduction in compensation beyond market value risks demoralising citizens.[1061] Further, such a move would potentially result in a loss of inward investment which would not be offset by the benefits of society receiving "free" or reduced property.[1062] However, to others, economic efficiency is reduced by the principle of equivalence, as powerful owners are able to counteract the risks of expropriation.[1063]

It must be noted that the ECtHR will only find a breach of A1P1 where there is an extreme disparity between the compensation awarded and value.[1064] One of the reasons for this is that the

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[1057] J. Kenny (ed) *Report of the Committee on the Price of Building Land* (Dublin, 1973) p 47.

[1058] O. Pollicino, "Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism" (2008) 4 *European Constitutional Law Review* 363.

[1059] *Jahn* (n 823) [111]-[112].

[1060] *Urbárska v Slovakia* (2009) 48 EHRR 49 [115].

[1061] F. Michelman, "Property, Utility, and Fairness" (1967) 80 *Harvard Law Review* 1165.

[1062] Ibid.

[1063] L. Blume and D. Rubinfeld, "Compensation for Takings: An Economic Analysis (1984) 72 *California Law Review* 569.

[1064] *Vistins v Latvia* (2014) 58 EHRR 4 [110]-[119].

ECtHR is unable to call and examine witnesses. As a result, the ECtHR is normally limited to the factual situation before the court and the documents presented to the court. This is not necessarily an acceptance that compensation is to be determined wholly by the contracting state, but more a recognition that the ECtHR lacks the necessary nexus to adequately determine the question of what constitutes fair market value.

5.6.2.1 CONCLUSIONS ON JUST COMPENSATION

It is argued that the Scottish land debate will remain theoretically unresolved due to the intractable tension between liberal individual notions of rights to property and social democratic conceptions of rights to property. The removal of the compensation requirement would mark a significant shift in Scots land reform, from a process that has been rhetorically radical, but in reality, limited, to one that is revolutionary. The differing opinions are a complex relationship between theft and restitution or unjustifiable interference in the market, to correcting the failures of neoliberalism. The question of compensation is at the core of the Scottish land question. How one conceives of just compensation is foundational to one's perspective on the entire debate.

It is clear that any Act of the Scottish Parliament that completely removes the principle of equivalence will be held incompatible with A1P1 and will, therefore, be not law. However, this does not mean that under certain confined circumstances compensation many be limited below "full" market value. A1P1 does not guarantee a right to full compensation in all circumstances. If we take the framework outlined by Dagan which places a value on the nature of the resource and the social context in which it is held and used, there may be the possibility of reducing the compensation requirement below the market value where it serves social justice and the public interest. Caution is necessary when implementing such a measure for it to remain compliant with A1P1, but it is possible.

The response to such a measure would perhaps limit its effectiveness. For example, if the framework given by Dagan, is followed the most significant possible reduction in compensation is 20%. The introduction of compensation below full market value would likely result in a media and judicial backlash. The risk would be that the surrounding litigation and controversy would increase the cost of the rights to buy.

The result of this analysis is that it is submitted that A1P1 prohibits truly "radical" reform in the form of expropriations without compensation. It is therefore clear that A1P1 does not

automatically entitle owners to full market value in very confined circumstances, but the Scottish Ministers would be taking a significant risk if they were to ever attempt to reduce compensation below market value. While such a move would perhaps satisfy certain elements of the pro-land reform agenda, it would fuel the counter narrative that the Scottish Government is attempting to undertake a socialist land grab. As a result, it would not only risk being a violation of A1P1, but would almost certainly derail the opportunity to reconcile existing claims.

5.7 RELEVANT NON-CONVENTION RIGHTS AND THE FAIR BALANCE TEST

It is submitted that the final part of the fair balance assessment for the contemporary right to buy is the effect of "relevant non-convention rights". As discussed in chapter two, the political rhetoric surrounding the inclusion of relevant ICESCR shows that the reference to the ICESCR and other non-convention rights was an attempt to rebalance the human rights debate.[1065] To Shields, "the nub of the issue is now focussed on legitimising interference with the right to property in pursuit of the public interest in order to enable the positive impact of land reform on economic, social and cultural rights".[1066]

This raises several problems. What weight should be given to relevant non-convention rights compared to Convention rights? Whether a "clash" is even possible is disputed. To some scholars clashes only occur due to the incorrect interpretation of one right when juxtaposed against another. While there is considerable literature on conflicting rights within the ECHR, little has been written on the relationship between the ECHR and other human rights instruments, and the application of the ICESCR and other socio-economic rights in Scots law.[1067]

It must be asked whether human rights tensions should be considered within a hierarchy of rights, and what abstract weight should be given to different human rights. The final consideration is whether finding a balance between competing interests can be legitimately decided by the judiciary or should be the preserve of democratic institutions.

[1065] SP, OR, RACCE, 11 March 2014, col. 46.

[1066] Shields (n 4) p. 9.

[1067] See S. Smet and E. Brems, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: OUP 2017).

5.7.1 A HIERARCHY OF RIGHTS

Whether a hierarchy of human rights exists is subject to dispute. The UN World Conference on Human Rights in 1993 declared that all human rights are "indivisible", "interdependent", and "inter-related".[1068] However, there are examples where the abstract weight of rights is not equal. The right to life has a higher weight than the right to the peaceful enjoyment of possessions.[1069] The problem is in the margins: when rational individuals disagree as to which human right has a higher weight. To Smith, the ranking of human rights should be determined by popular referendums.[1070] With recent events in mind, it is unlikely that a referendum of this nature will take place in the near future.

As already noted, to many, socio-economic rights are "secondary" or lesser rights. Pipes went as far as to describe socio-economic rights as "at best a moral claim, and at worst, if enforced by public authority an unearned privilege".[1071] As the UN Committee on Economic Social and Cultural Rights ("CESCR") noted: "In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights".[1072]

Whether "property" is a human right is also disputed. Scots land reform and the contemporary debate surrounding rights to property and socio-economic rights are exposing a fundamental tension between conceptions of property. This is further complicated by the reality that while rights to property are a central pillar of private law, rights to property lack a similar resonance in public law.[1073] To Waldon, "the slogan that property is a human right can be developed only disingenuously to recognise the massive inequality that we find in modern capitalist countries".[1074] American property theorist, Alexander, cites two core concerns: first, that protecting rights to

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[1068] Vienna Declaration and Programme of Action, 12 July 1993, A/CONF. 157/23 para 5; UN General Assembly Resolution, 48/121 20 December 1993.

[1069] M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: OUP 2012) pp. 27-28.

[1070] B. Smith, "Using Popular Referendums to Declare Fundamental Rights" (2001) 11 *Boston University Public Interest Law Journal* 123.

[1071] R. Pipes, *Property & Freedom* (London: Harvill Press 1999) p. xvi.

[1072] CESCR, General Comment N° 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998) para 10.

[1073] TP, vol. II, p. 52.

[1074] J. Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) p. 5.

property in such a manner "shrinks the scope of democratic deliberation" since they become "beyond change, modification, or ending through ordinary political processes", and second, that protection has a fundamentally anti-redistributive effect.[1075]

Despite these conflicting claims, it is clear that the Scottish Ministers cannot choose to opt-out of the minimum standards for Convention rights.[1076] Even if the Scottish Ministers are unhappy with the potentially limiting effect of Convention rights on their apparent democratic mandate for "radical" land reform, this cannot be used as a justification to limit the universal importance of the rights contained in the Convention and its Protocols.[1077] Therefore, despite the apparent anger and indignation many in Scotland have at the nation's concentrated patterns of land ownership, this cannot be used to justify limiting the effect of the rights contained in the ECHR.

The jurisprudence from around the world shows that courts have been apprehensive to make direct pronouncements on these questions and instead prefer to defer to democratic institutions. What weight should be given to differing rights in relation to contemporary land reform in Scotland will remain a controversial question. The relative weight of socio-economic and community rights compared to rights to property will be determined, at an individual level, by various explicit and implicit political, social and economic assumptions.

Scotland should turn to South Africa for a comparative lens. The South African 1996 Constitution protects private rights to property in Section 25(1) and socio-economic rights in several regards, including Section 26 which guarantees a right to access to housing and a protection against eviction and Section 25(5) and (6) which provides a right to access to land and security of tenure. A considerable body of jurisprudence has built up in which the South African courts have attempted to balance these conflicting rights.

The decision of the South African Constitutional Court in *Modder East Squatters v Modderklip Boerdry (Pty) Ltd* concerned an eviction order of a settlement of an estimated 18,000 squatters east of Johannesburg.[1078] Some of the land was incorrectly thought to be owned by the municipality, but in reality, it was privately owned. The foundation of the claim was the enforcement of an eviction

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[1075] G. Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago: University of Chicago Press, 2006) pp. 30-34.

[1076] See International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997.

[1077] *Tyrer* (n 583) [31].

[1078] *Modderklip Boerdery* (n 446).

order against unlawful occupiers. The Court made it clear that the state has a duty to step in and assist the landowner in protecting her property against an unlawful occupation.[1079] The Constitutional Court held that it would cause "unimaginable social chaos and misery and untold disruption" to evict the squatters.[1080] Van der Walt wrote, following the decision, that the South African Constitution has to be read in a manner that recognises and accommodates both the rights of landowners and the rights of those who do not have access to land.[1081] The lesson for Scotland is that rights to property and socio-economic rights when juxtaposed, do not necessarily have to result in one individual or group's human rights being wholly set aside. In the *Modderklip Boerdry* case, the court chose to protect the squatters' rights until another adequate site could be acquired. The court also chose to balance the deprivation of property and to make sure that the owner did not have to bear an individual and excessive burden by holding that they were entitled to compensation.[1082]

It is appreciated that this does not give concrete guidance, nor does it give an official weight to individual human rights that could be used in something resembling a mathematical formula. The critical lesson from *Modderklip Boerdry* is the indivisibility of human rights, the importance of a democratic dialogue, and an obligation on the state to protect the rights of the community and the landowner.

5.7.2 THE FAIR BALANCE TEST AND SOCIO-ECONOMIC RIGHTS

To Vandenhole, the ECtHR comes close to applying a "proportionality plus" test in instances of conflicts of socio-economic rights.[1083] The "plus" in the proportionality test is the addition of socio-economic considerations. This means that the balancing exercise involves *inter alia* considerations such as the financial situations of the parties and the power relations.[1084] The "plus" is supposed to emphasise the importance of taking a holistic approach to judicial decision-making.

[1079] A. J. Van der Walt, "The State's Duty to Protect Property Owners v the State's Duty to Provide Housing" (2005) 21 *South African Journal on Human Rights* 144, 158.

[1080] *Modderklip Boerdery* (n 446).

[1081] Ibid 149.

[1082] Ibid.

[1083] W. Vandenhole, "Conflicting Economic and Social Rights: The Proportionality Plus Test" in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Oxford: Insertia 2008) p. 575.

[1084] *Hutten-Czapska* (n 742) [178].

Sachs J gives a certain amount of guidance in the South African Constitutional Court decision of *Port Elizabeth Municipality v Various Occupiers*. The court identified three salient features:

> First, The Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the state or by landless people. The rights involved… are defensive rather than affirmative. The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers[1085]
>
> A second major feature of this cluster of constitutional provisions is that through section 26(3) they expressly acknowledge that eviction of people living in informal settlements may take place, even if it results in loss of a home.[1086]
>
> A third aspect of section 26(3) is the emphasis it places on the need to seek concrete and case-specific solutions to the difficult problems that arise.[1087]

As noted above, in tackling tensions between socio-economic rights and civil rights to property, South Africa has focused on the State's duty to protect both rights. The South African courts have come to conclude that conflict would never have arisen if the State had complied with its duties towards both rights.[1088] The right to housing is said to be "an important right", but the importance of the right to property is equally recognised.

In *Port Elizabeth Municipality,* the court gave significant weight to the unequal power relations between the two parties, noting that private rights to property are "qualified and subject to societal considerations".[1089] This was justified to redress "the grossly unequal distribution of land" which is a legacy of the apartheid era. To Sacks J, the role of the court in cases where two rights are in conflict is to "balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and specific factors relevant in each particular case.[1090] The

[1085] *Port Elizabeth Municipality v Various Occupiers* [2005] 1 SA 217 (CC) (South Africa) [20].

[1086] Ibid [21].

[1087] Ibid [22].

[1088] *Modderklip Boerdry* (n 446) [40].

[1089] Ibid [16].

[1090] Ibid [23].

same court in the *Grootboom* case observed that "[t]hose whose needs are the most urgent and whose ability to enjoy all rights… is most in peril must not be ignored by the measures aimed at achieving the realisation of rights".[1091]

It is submitted that the lesson for Scotland is that the reference to relevant non-convention rights in the rights to buy legislation should play a role in determining whether the fair balance has been satisfied in applications concerning A1P1. As was argued in chapter two, if circumstances were to arise in which more than one compatible interpretation of A1P1 was open to the Scottish Ministers or judiciary, they would be required, in choosing between those options, to have regard to the ICESCR and other relevant non-convention rights. The South African experience is useful as it shows that modern legal systems can balance the potential rights-tensions that arise. It is argued that Scotland should learn from the importance the South African judiciary has placed on protecting both rights and the existence of a dialogue between the judiciary and democratic institutions. As was shown in chapter two, the caveat is that this must be done in a manner that is compliant with their existing obligations and devolved competencies. Relevant non-convention rights cannot allow for the limiting or reinterpretation of A1P1 to the extent that such an interpretation is *ultra vires*. Acts of the Scottish Parliament that are not compatible with A1P1 will be held to be not law.[1092]

5.7.3 THE LIMITS OF PROPORTIONALITY

The balancing of human rights has been subject to criticism.[1093] To the German philosopher Habermas, balancing downgrades the normative powers of rights to merely goals or values. They thereby lose the "strict priority" that is characteristic of "normative points of view".[1094] To Habermas, if "cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses".[1095] To some critics, the question of balancing rights tensions and undertaking a proportionality assessment results in the judiciary determining whose rights and interests should

[1091] *Grootboom* (n 455) [44].

[1092] *Salvesen* (UKSC) (n 11).

[1093] J. Habermas, *Between Facts and Norms* (Trans. W. Rehg) (Cambridge: Polity, 1996).

[1094] Ibid p. 256.

[1095] Ibid p. 258.

prevail. This confers on the judiciary a task that should perhaps be the preserve of democratic institutions.[1096]

5.7.4 CONCLUSIONS ON PROPORTIONALITY

It is submitted that the application of the contemporary rights to buy to A1P1 exposes the intractable tension at the core of the proportionality standard. The courts are to make what often appear to be ad hoc decisions based on the evidence presented before them. The multitude of disparate factors taken into account means that a coherent line of reasoning is difficult to discern, and all possible scenarios have not been exhausted. Judges cannot be Dworkin's conception of the all-knowing judge Hercules. The viability of a community right to buy in the future and whether the proposals will result in "sustainable development", cannot be considered with absolute surety by a Minister or a member of the judiciary. Instead, we are left with a system of making the best possible educated guess which places significant weight on the decisions of democratic institutions. The decision is not subject to review after a period of time. If a community expropriates land for sustainable development, the landlord cannot return five years later, provide evidence that the community is not fulfilling the promises made during its application, and have the land return to him as it was expropriated under false representation or at least misleading or inaccurate predictions.

However, if you look at much of the rhetoric surrounding land reform in Scotland, it is the statistical diversification of ownership — the numbers that grab the headlines — that appears to be the primary concern. As such, even if the community has not been able to promote sustainable development, is it better that the community (or at least a company purporting to represent the community) has title and not an individual landlord? This once again exposes an intractable tension, as it asks what the purpose of land reform is and if it is simply to diversify ownership, to promote economic development, or to promote environmental wellbeing.

It is submitted that it is within part 4 of the proportionality requirement that the real core of the Scottish land question exists today. The Ministers and judiciary's interpretative obligation requires them to determine when, in a given instance, the expropriation of land is permissible. The prevailing debate has focused on whether A1P1 will act as a "red card" or a shut gate to

[1096] J. Morgan, "Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties" in T. Campbell, K. Ewing & A. Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: OUP 2011) p. 429.

contemporary rights to buy. This thesis has, however, shown that to ask such a question is to misunderstand how A1P1 has been interpreted in practice and the various tensions at the core of disputes over the ownership of valued resources. The problem remains that conceptions of property remain disputed between liberal conceptions of individual entitlement and social democratic theories that often focus on egalitarian distribution. The core of the dispute is how to adequately reconcile these tensions. In the words of Kipling:

> But my Totem saw the shame; from his ridgepole-shrine he came,
> And he told me in a vision of the night: —
> "There are nine and sixty ways of constructing tribal lays,
> "And every single one of them is right!"[1097]

Rudyard Kipling
In the Neolithic Age

In relation to the competing claims over the correct interpretation of rights to property in Scots law, there is a certain merit to the conclusion that "every single one of them is right!". What constitutes valid deprivation remains a fundamentally political question. The conclusions one makes are formulated by various implicit and explicit assumptions about the world which make question over the just entitlement of rights to property essentially contested. Whether a particular right to buy satisfies the "fair balance" is a question of politics, economics, sociology, ecology and many other specialist and case-specific factors, that can be thrown into the equation.

This is why the most fraught and misunderstood element of the Scottish land question remains the application and effect of A1P1. To say that every one of the competing claims is right is not to avoid the answer, but shows that when considering whether an expropriation constitutes a legitimate interference under A1P1 the Scottish Ministers and judiciary are to consider a question of balance: an equation of sorts. Unlike mathematicians, decision-makers cannot necessarily prove their conclusions through the luxury of a closed structure permitting verifiable and repeatable proofs. As such, all lawyers and politicians risk leaving their assertions vulnerable to different interpretations and susceptible in part to criticisms of didacticism. This thesis has argued that questions over the "just" distribution and protection of rights to property are not, as is often

[1097] R. Kipling, *Stories and Poems* (Oxford: OUP 2015) p. 452.

asserted, binary. In an often inconceivably complex world, disparate claims to property can have elements of legitimacy and illegitimacy.[1098]

The Scottish Ministers and judiciary are required to find solutions to the problems presented and cannot simply proclaim the issues before them to be too complex to resolve. In practice, decisions about property entitlements are unavoidable, and, despite the possibility of the incommensurability of values, making a decision remains possible through reasoned deliberation. When examining potential tensions between rights to property and conflicting communitarian or social-economic rights, judges, scholars, and lawyers must consider in greater detail the political, moral, and economic theory underpinning the law.[1099]

The proportionality of an interference under A1P1 therefore requires a detailed consideration of multiple factors. This can only be logically achieved through following the four-part rule-based approach outlined above. The court or decision-making body cannot purport to find a correct answer in the sense that it is impervious to criticism. The purpose of the proportionality standard is to find a balance between the competing interest and to assess the relative weight of the aims sought and the means undertaken. This is not about finding some mysterious "red card". As such, it is impossible to say if the rights to buy constitute a disproportionate interference with A1P1 in their textual form. Instead, it is for the Scottish Ministers and the judiciary to determine the relative weight of a given application before them. What the above analysis has done is to set out the rules to be followed and highlighted several problems that may arise. However, the unique nature of land as a valued resource and the multitude of disparate ways in which the contemporary rights to buy legislation can be utilised means that each application should be considered on its own merits.

5.7.5 CONCLUSIONS ON APPLICATION OF A1P1 TO CONTEMPORARY RIGHTS TO BUY

This chapter has made several important conclusions on the application and effect of A1P1 in relation to contemporary rights to buy in Scotland. It has been shown that the victim test is a relatively low standard. It has been argued that the question of whether an applicant holds a "possession" will be easy to ascertain in most instances. However, in the margins, especially in

[1098] D. Maxwell, "Disputed property rights: Article 1 Protocol No.1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016" (2016) 41 *European Law Review* 900, 923.

[1099] R. Dworkin *Law's Empire* (Cambridge MA: Harvard University Press 1986).

cases where there is a legitimate expectation of obtaining a possession, it will likely remain blurred. It is hoped that the forthcoming decision in the appeal of *McMaster v Scottish Minister* will add some clarity.

This chapter has analysed how the judiciary should classify interferences under A1P1. It was submitted that the registration of a community interest and other steps that eventually lead to a right to buy could constitute a control of use. However, it was concluded that even if this is established, it is unlikely that such a control of use would impose an individual and excessive burden, as their use of the property is not severely diminished. It was then contended that when the rights to buy are utilised, it will be relatively straightforward to establish that a deprivation has taken place, as landowner's rights to property are extinguished and replaced with a right to compensation. The problem remains in determining when a control of use is sufficiently severe to constitute a *de facto* deprivation. For example, if a community purchased 50% of an estate making the remaining 50% uneconomical, it remains unknown as to whether this would constitute a *de facto* expropriation of the entire estate. It was shown how the recent Supreme Court decision in *Mott* highlights that the domestic courts are primarily concerned with the burden imposed, although in this instance the Supreme Court spurned the opportunity to offer clarity on the correct parameters between a control of use and a deprivation.[1100]

This chapter has submitted that concerns remain over whether certain key parts of the rights to buy legislation satisfy the lawfulness requirement and are sufficiently accessible and foreseeable. In particular, it was argued that the definitions given for sustainable development, community, abandoned and neglected, and when a landlord is in breach are unsatisfactory. However, it is concluded that the broad margin of appreciation given by the ECtHR and the significant weight given to democratic institutions, as was apparent in *Pairc v Scottish Ministers*, means that it is unlikely that the rights to buy legislation will be held to violate the lawfulness requirement under A1P1.[1101]

It was submitted in chapter three, and has been affirmed in chapter four, that the public interest test has been rendered a paper tiger in the face of the wide margin of appreciation, bordering on fourth instance interpretation given by the ECtHR, and the significant weight domestic courts tend to give democratic institutions. As such, it is almost impossible to envisage Scots land law reform being held incompatible with the public interest test under A1P1.

[1100] *Mott* (UKSC) (n 688).

[1101] *Pairc Crofters* (n 43).

Chapter four followed the four-part rule-based approach to proportionality that was outlined in chapter three. It has forwarded that the vague rhetoric and public policy surrounding the aims of the contemporary rights to buy legislation posed a particular set of challenges. However, it was concluded that the broad margin of appreciation and judicial deference meant that the courts were unlikely to intervene. The next question was whether the rights to buy were rationally connected to the aims forwarded by the Scottish Ministers. The problem is still the lack of clarity around what the aims are in practice and the limited available evidence. Economic evidence can be cited that favours the fragmentation of land as promoting development, but even the Scottish Government's research has shown that it cannot be proven that land reform has a positive impact on sustainable development. It was submitted that this exposed a difficulty at the core of land reform and the proportionality standard, as it is exceedingly difficult for a court to discern the best available evidence. Added to this point is the problem of determining who is best placed to assess the relative weight of conflicting evidence. It was submitted that, in this regard, the courts should be apprehensive to intervene.

It was argued that domestic courts are required to consider whether the aims sought could have been achieved through less intrusive means. It was argued that, in many instances, the aims sought by the Scottish Ministers can be realised without completely extinguishing the owners' rights. In particular, it was argued that the right to buy when the landlord is in breach allowed the Scottish Ministers to use a sledgehammer when a nutcracker would in most cases be sufficient. Parts 2 and 3 are important as they raise the question of the rationality of the contemporary rights to buy. It is submitted that the most likely recourse for successfully challenging the existing rights to buy will be in the form of arguments that the Scottish Ministers did not undertake their decision-making in a sufficiently exacting manner. The existing jurisprudence shows that the scale and level of detail that is to be accepted by the court is critical. While the ECtHR was historically prone to determine the broader purpose of the interfering legislation, the domestic jurisprudence shows a willingness to consider the individual circumstances of the victim.

The final part of the proportionality test, often called results proportionality or the fair balance test, should be considered the essential point in all A1P1 applications. It was shown how the inclusion of provisions for just compensation in the rights to buy legislation will in most instances satisfy the fair balance requirement. It was argued that this helps to illustrate the myth of absolute ownership of land and instead means that land ownership often resembles a liability rule. It was

then shown how this requirement will likely limit the Scottish Ministers' ability to radically alter ownership patterns in Scotland due to the cost of purchasing land. It was considered whether land could be deprived for less than its open market value. This question is controversial and has been raised by several of the more radical elements of the pro-land reform agenda. It was submitted that in most instances, full compensation must be paid, but by utilising the work of Dagan, under certain narrowly defined circumstances compensation may be reduced. However, the reduction could only be nominal, and any attempt to remove the compensation requirement in its totality would be a violation of A1P1.

It was submitted that it is important to accept, that part of the fair balance test requires the consideration of relevant non-convention rights in particular the ICESCR, as discussed in chapter two. The jurisprudence of South Africa was utilised to show that land reform should aim to protect the rights of non-owners, tenants, and landowners, and that the primary focus of the Scottish Ministers and the judiciary should be the indivisibility of human rights. This means that, if more than one interpretation of A1P1 is possible, regard must be had to the relevant non-convention rights.

This chapter has shown that the existing binary debate which asks whether A1P1 gives an absolute protection to rights to property or instead is completely subservient to the decisions of the Scottish Ministers misunderstands how A1P1 works in practice. This chapter has shown how A1P1 should be seen as a justifiable hurdle to be overcome to allow for the permissible interference with rights to property. It is submitted that a structured rule-based approach to interpreting whether a given right to buy is compatible with A1P1 is necessary for the interests of consistency, and to avoid the Scottish Ministers and judiciary acting in a manner that is incompatible with Convention rights.

6 CHAPTER FIVE
LAND LAW AND HUMAN RIGHTS

6.1 INTRODUCTION

The enactment of the HRA, and the possibility of supranational human rights law coming to influence private law, was greeted by many with suspicion.[1102] However, prior to 2012, it appeared that A1P1 was still only of limited effect in domestic courts. The House of Lords had overturned several activist judgments from the Court of Appeal.[1103] That was until the Supreme Court was asked to consider the test case of *Salvesen v Riddell* and whether the AH(S)A 2003 was a disproportionate interference with the landowner's rights under A1P1.[1104] The *cause célèbre* of land reform is also arguably the most important decision relating to A1P1 in the UK.[1105]

The final chapter of this thesis will consider what effect A1P1 has had on domestic property law, and will ask what lessons can be learned for the application and effect of A1P1 in the UK from the analysis relating to land law reform in Scotland. A critical question remains unanswered as to the true effect of A1P1 on domestic law. It is to be asked if A1P1 represents, as Wilson J suggested, a "reservoir of entitlement" for applicants who have lost out under domestic property law.[1106]

While categorisation has its limits, this chapter will break down the potential effect of A1P1 into three distinct theories. The first is known as the "sceptical" or "mirror" theory. This holds that A1P1 preserves existing principles of domestic property law. To some, this extends to a positive obligation not to allow the ECHR to alter domestic law. The second is the theory of "displacement" or "subordination" under which A1P1 inherently limits domestic law. Under the displacement theory, A1P1 has displaced native rights to property and replaced these entitlements with the supra-national rights of the ECHR. The third theory offers a more nuanced (and complicated), appraisal of the application of A1P1 to domestic rights to property. The complementary theory forwards that A1P1 has come to exist within, or concurrently with,

[1102] J. Howell, "Human Rights Act 1998: Land, Private Citizens, and the Common Law" (2007) 123 *Law Quarterly Review* 618, 643.

[1103] *Wilson* (n 629).

[1104] *Salvesen* (UKSC) (n 11).

[1105] Ibid.

[1106] *Pirabakaran v Patel* [2006] EWCA Civ 685, [2006] 1 WLR 3112 [41].

domestic law. The theory is, in practice, a complex mix of the first two. It holds that, in certain circumstances, A1P1 mirrors domestic law or offers a less effective remedy, but also that in others, it also engages and can influence, subordinate, or inherently limit domestic law. While the first two theories offer a relatively straightforward binary view on the effect of A1P1 in domestic law, the third does not really answer the critical questions for litigators, the judiciary, and the legislature, of when exactly A1P1 is engaged in a manner that inherently limits domestic law. Instead, it simply concludes that this is an indeterminate question. The problem of determining when A1P1 inherently limits domestic law, is in practice, a labyrinth of possibility for which there is no discernible verifiable and repeatable mathematical proof. However, the legal system cannot work in the abstract.

Whether A1P1 significantly alters domestic law remains disputed.[1107] The answer to this question, while initially appearing quite distant from the *raison d'être* of this thesis, has significant consequences. The extension of fundamental rights into what was traditionally a private law matter among largely non-state actors' risks, in the words of Gerstenberg, "a sweeping judicial usurpation of legislative prerogatives in determining the boundaries of spheres of private autonomy, thereby displacing or even overriding the policy choices of [the] statutory legislator".[1108] There can be little doubt that much of the often-forceful rhetoric surrounding the effect of A1P1 on contemporary reforms has centred on A1P1 curtailing the ability of the Scottish Parliament to legislate freely on an issue in relation to which it believes it has a democratic mandate.[1109] If A1P1 mirrors existing private law principles, then the conception of public law usurping the Scottish Ministers programme of progressive land reform is misplaced. However, as this chapter will show that the relationship between private law and public law is exponentially more complex.

6.2 THE MIRROR THEORY

The "mirror" theory holds that Convention rights replicate existing principles of private law. This is part of the truism that statute and the private law have long-protected human rights. As Lord Denning asserted while addressing the House of Lords prior to the passing of the HRA: "we have

[1107] Howell, "Human Rights Act 1998: Land, Private Citizens, and the Common Law" (n 1027) 643.

[1108] O. Gerstenberg, "Private Law and the New European Constitutional Settlement" (2004) 10 *European Law Journal* 766, 769; Collins (n 493).

[1109] SP, OR, RACCE, 7 October 2015, col. 10.

no need for them [Convention rights] to be written down in this country. The judges have been able to protect them by their decisions".[1110]

It is obvious that the ability of Scots law to protect rights to property did not start with the signing of A1P1 or the enactment of the HRA and the creation of Convention rights. To the Institutional writer Erskine, ownership entailed "the right of using and disposing of a subject as our own, except in so far as we are retrained by law or paction".[1111] The Scottish Constitutional Convention in 1995 asserted that the incorporation of the ECHR into domestic law was to be firmly based on "Scottish traditions and values".[1112] The question is whether the principles developed by the ECtHR discussed in chapters 3 and 4 of this thesis differ drastically from the traditional concepts of rights to property in Scots law or, instead, mirror existing entitlement.

There is jurisprudence that points towards A1P1 simply replicating private law. Sullivan J, in the English case of *Tesco v Secretary of State,* was "not persuaded that either the Convention or the principle of proportionality add any new dimension to the pre-Convention jurisprudence".[1113] Harrison J followed in another English case this apparent indifference to Convention rights in *Sainsbury's Supermarkets Ltd v Secretary of State*.[1114] In *Carroll* v *Scottish Borders Council,* the Court of Session considered the approach to be taken, in a planning law context, when a court scrutinises a discretionary decision delegated to a statutory body.[1115] In *Carroll,* this concerned the grant of planning permission for wind turbines. Lord Menzies, sitting in an Extra Division of the Inner House, placed importance on the Scottish Planning Series Circular 4/2009.[1116] To Lord Menzies, "[p]roportionality is achieved in our planning system if the decision maker properly takes account of the public interest and the rights of the individual. Neither EU nor Convention law adds to this – the question remains, have the decision makers done what they ought to have done?"[1117] *Carroll* was cited with approval in *Coastal Regeneration Alliance Limited v Scottish Ministers and Scottish Power*

[1110] HL Deb, 6 July 1960, vol. 224, col. 1195.

[1111] Erskine, *Institute*, Book II, 1, 1.

[1112] Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (Edinburgh: Convention on Scottish Local Authorities 1995) p. 20.

[1113] *Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P & CR 427, 749 (HC).

[1114] *R (Sainsbury's Supermarkets Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 [35].

[1115] *Carroll* v *Scottish Borders Council* [2015] CSIH 73, 2016 SC 377.

[1116] Ibid [20].

[1117] Ibid [32].

Generation Limited, where Sheriff Ross, sitting in Edinburgh, considered the application for a community right to buy two plots of land in East Lothian near the old Cockenzie power plant.[1118] In *Coastal Regeneration Alliance Ltd* Sheriff Ross noted that the court was invited to accept that this [Lord Menzies in *Carroll*] was the correct approach in a land registration context. The applicable principles are similar, and there is no persuasive basis (and none was suggested) to distinguish between a planning context and a land registration context.[1119] If the reasoning of Lord Menzies and Sheriff Ross are followed to their logical conclusion, public law in the form of Convention rights have done little more than mirror existing private law rights.

If one takes a tunnel vision approach to A1P1 the serving of a notice to quit on the holder of an agricultural tenancy is an interference with the tenant's rights to property under A1P1 and also most likely their rights under Article 8. The tenant held a "possession", and that possession has been deprived. The agricultural tenant has the right to his private life, family and correspondence. This has been interfered with. However, A1P1 cannot in this example inherently limit private law and change the terms of the lease or partnership. This is an example of the enforcement of a pre-existing legal right, and not a shift or transfer of a right. In such instances, Lees would hold that, where Convention rights protect pre-existing legal rights (the tenant was always subject to the partnership agreement), there cannot be an interference within the meaning of A1P1 and Article 8.[1120]

The early apprehension to engage with A1P1 can be observed in *Wilson v First County Trust Ltd (No. 2)* where the House of Lords overturned a declaration of incompatibility by the Court of Appeal.[1121] The case concerned an improperly executed consumer credit agreement in relation to a pawned BMW convertible. Lord Hope observed that A1P1:

> … does not confer a right of property as such, nor does it guarantee the content of any rights in property. What it does instead is to guarantee the peaceful enjoyment of the possessions that a person already owns, of which a person cannot be deprived except in the public interest and subject to the conditions provided for by law.[1122]

[1118] *Coastal Regeneration Alliance Ltd v Scottish Ministers* 2016 GWD 29-523 (Sh Ct).

[1119] Ibid [43]; *Carroll* (n 1115).

[1120] Lees (n 26) 35.

[1121] *Wilson* (n 629) [106].

[1122] Ibid.

> It is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases, it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired.[1123]

The result was that while the House of Lords accepted that there had been an interference under A1P1, the court should give greater weight to the decision of parliament and the underlying purpose of the regulatory framework, as to do otherwise would have weakened consumer protection. Further, Lord Hope placed significance on the fact that the agreement was entered into improperly. Therefore, it was always subject to the restrictions on its execution under the Consumer Credit Act 1974.[1124] Similarly, in *Aston Cantlow*, Lord Hope held that a chancel repair liability was an incident of ownership, and so the enforcement of the liability could not amount to an A1P1 interference with possession.[1125] It is reasonable to conclude that, in many instances, A1P1 has been held to mirror private law. This is especially the case where the property right is from its creation subject to a specific risk of interference, such as through a tenancy agreement. In such instances, there can be no interference with A1P1 when the potential interference crystallises.[1126]

There is therefore evidence that, in many instances, A1P1 mirrors private law. To use a metaphor, private law and public law become like two identical semi-detached houses standing together. They support each other's overall structure, but a partition wall means that you cannot walk freely from one to another. However, to a purchaser, the division is largely irrelevant as the two houses are

[1123] Ibid.

[1124] Ibid [107].

[1125] *Aston Cantlow* (n 352).

[1126] Allen, *Property and The Human Rights Act 1998* (n 25) p. 234.

pari passu. The problem with the application of the mirror theory across the broad spectrum of property law is that it would render A1P1 little more than a box-ticking exercise, and the semi-detached house signposted "private law/domestic law" is automatically preferred, leaving the house marked "public law" unable to develop a meaningful character of its own. The difficulty that mirror theory faces is that there are examples when A1P1 has been innovatively applied by the Supreme Court to allow for a remedy that is only possible because of A1P1.[1127] In doing so, the courts have smashed the image of two perfectly replicate semi-detached houses, and as such it is difficult to hold that public law simply mirrors private and domestic law.

6.3 DISPLACEMENT AND SUBORDINATION THEORY

The HRA resulted in concerns that "superimposed" Convention rights would come to inherently limit and, as a result, radically alter domestic property law.[1128] The "displacement" or "subordination" theory holds that private law is subservient to Convention rights to the extent that public law and human rights have come to exclusively govern relationships that were traditionally the domain of private law. Fundamental rights thus do not simply influence private law; They govern private law, thereby enjoying priority over private law values.[1129] As already noted, the HRA imposes duties on public authorities in domestic law, reflecting the obligations undertaken by the UK under international law by its ratification of the ECHR. It did so by creating "Convention rights" as a counterpart of the rights guaranteed under international law by the ECHR.[1130] The purpose of the HRA is to give effect to rights and freedoms guaranteed under the ECHR; the domestic rights created by the HRA are interpreted by reference to the corresponding rights under the ECHR.[1131]

Taken to its extremes, displacement theory holds that Convention rights have full, or direct horizontality, and the courts are "required to create appropriate rights and remedies by revising the common law to protect Convention rights subject only to the limitation that a clear statute must prevail".[1132] This was forwarded by Sir William Wade to whom the Convention should have

[1127] *Mott* (UKSC) (n 688); *Salvesen* (UKSC) (n 11).

[1128] Carey-Miller (n 827).

[1129] O. Cherednychenko, "Fundamental rights and private law: A relationship of subordination or complementarity?" (2007) 3 *Utrecht Law Review* 3.

[1130] Murdoch and Reed (n 62) p. 1

[1131] *S and Marper* (n 64).

[1132] I. Leigh, "Horizontal Rights" (1999) 48 *International & Comparative Quarterly* 57, 86.

"full operation in the sphere of private rights".[1133] To Wade, the state, as manifest in the courts, is required to act in a manner that is compatible with Convention rights.[1134]

The primary argument against the application of constitutional human rights in private law is that recognition of these rights in relationships between private individuals will deeply harm human rights themselves, primarily the individual's autonomy of will.[1135] For example, the risk is that human rights could come to invalidate contracts that would be valid under domestic contract law. This could introduce an unacceptable level of indeterminacy and seriously limit the individual's right to freedom of contract. The counter-argument, as posited by MacDonald, is that:

> The most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise, when contrasted with an employer's power to dismiss, a landlord's power to exclude the needy, or an entrepreneur's refusal to provide services.[1136]

To others "the relationship between private parties must be regulated, as it has been from time immemorial, by private law".[1137] There are several theoretical justifications for direct statutory horizontality. The Dutch academic van Dam asserts that human rights and private law (in his example, tort law), protect the same fundamental rights.[1138] There is a certain merit to this, but it cannot be ignored that private law has developed to govern relationships between theoretically equal individuals. Human rights have developed, in response, to curtail the state's coercive monopoly on violence.

Proponents of direct statutory horizontality can be observed throughout Continental Europe, but a note of caution is necessary.[1139] First: the UK remains a dualist state, and this must be preserved; second: the HRA does not incorporate Article 13 of the ECHR which provides that everyone

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[1133] W. Wade, "Horizons of Horizontality" (2000) 116 *Law Quarterly Review* 217.

[1134] Ibid.

[1135] Barak (n 771) p. 35.

[1136] R. MacDonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses (1982) 4 *Supreme Court Law Review* 321, 347.

[1137] Barak (n 771) p. 18.

[1138] C. van Dam, *European Tort Law* (Oxford: OUP 2013) p. 223.

[1139] M. Kumm, "Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalisation of Private Law (2006) 7 *German Law Journal* 341.

whose rights have been violated "shall have an effective remedy before a national authority".[1140] The ECHR and HRA do not envisage horizontal effect in their wording.[1141] Further, direct horizontality is problematic as there are no specific remedies available against a judicial decision that fails to protect a Convention right and which is arguably an unlawful act of a public body.

Lord McCluskey famously feared the potential "disruption" caused by the domestic application of the ECHR to the Scottish judiciary would be "a field day for crackpots, a pain in the neck for judges and legislators, and a gold mine for lawyers".[1142] The ECHR is an odd institution in many ways, with its fair share of problems. There can be little doubt that the UK has always had an uneasy relationship with the Council. Whether it is prisoner voting,[1143] human rights on the battlefield, or the attempted deportation of radical clerics,[1144] politicians and certain corners of the media have done astonishingly well at distorting the public perception of the HRA. In response to the *Hirst* decision, Foreign Secretary Liam Fox asserted that the decision was "an outrageous decision and a perfect example of how Europe is intruding in areas of our national life where it has no business".[1145] Laws LJ asserted that the HRA has pushed the judges into the field of political decision and that the result has been a failure to keep control of the proper place of human rights".[1146]

The application of A1P1 to land law reform in Scotland is somewhat peculiar in this regard. Especially since the decision in *Salvesen*, the same criticisms cited by Liam Fox and Laws LJ have been asserted by those who would normally be expected to extoll the virtues of the ECHR.[1147] Critics and politicians like to hold A1P1 up as unjustly protecting individual entitlement at the expense of the Scottish Ministers' ability to legislate freely.[1148] The potentially limiting effect of A1P1 on contemporary Scots rights to buy through the compensation requirement (as discussed early in this thesis) highlights the potential for Convention rights to limit the ability of democratic institutions to carry out their functions. The counter argument is obvious, but perhaps not suitably

[1140] ECHR Article 13.

[1141] Lees (n 26) 35.

[1142] M. Howard, "Judges must bow to the will of Parliament" *The Telegraph* (London: 10 August 2005).

[1143] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

[1144] *Othman v United Kingdom* (2012) 55 EHRR 1.

[1145] E. Voeten, "The Politics of International Judicial Appointments" (2007) 61 *International Organisation* 669, 669.

[1146] J. Law, *The Common Law and Europe: Hamlyn Lecture III* (Cambridge: CUP 2013) para. 23.

[1147] SP, OR, 16 March 2016, col. 49-52.

[1148] SP, OR, J, 23 January 2002, col. 946.

articulated. Human rights law is designed to curtail the legislative ability of states, as they evolved as a direct response to centuries of individuals' rights being abused by the state. The rights are universal, and their protection stops despotic interferences by the state and preserves the individual in the face of the potential tyranny of the majority. However controversial the decision in *Salvesen*, Lord Hope was undoubtedly correct to assert that, "as a minority group landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else".[1149]

To return to the semi-detached houses metaphor above, the displacement theory in essence holds that the walls have been knocked through and we are left with only one single occupancy house that inhabits the entire structure. In essence, this constitutes Lord Neuberger's conception of a "grand unifying theory",[1150] or what Collins describes as "a single source theory of the structure of a legal system".[1151]

6.4 COMPLEMENTARY

What this thesis has termed the "complementary theory" is the most difficult of the three theories to explain in a succinct manner. This is close to the German constitutional law concept that human rights have an "*Ausstrahlungswirkung*" (radiating or rippling effect), on the entire legal system.[1152] The complementary theory indicates that Convention rights are important within the existing hierarchy of rights, but do not negate the role of private law. Thus, while Convention rights influence private law, private relationships are still left to be primarily governed by the norms of private law.[1153]

The extent of the complementary theory is often determined by the question of whether the Convention rights have "strong" or "weak" indirect horizontal effect. The radiating effect of A1P1 may influence judicial reasoning, although exactly when A1P1 as a complementary right "bites" and influences and (or) determines the outcomes of a dispute between parties, and (or) determines the manner of judicial reasoning, is more difficult to explain. This is beyond simply an indirect

[1149] *Salvesen* (UKSC) (n 11) [38].

[1150] Lord Neuberger, "Forward", in D. Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011) p. xiii.

[1151] Collins (n 493) p. 19

[1152] Kumm (n 1139).

[1153] Cherednychenko (n 1129).

acknowledgement that Convention rights exist or accrediting existing domestic conceptions of rights to property to A1P1.

In *HM Advocate v Montgomery*, Lord Justice-General Rodger, sitting the High Court of Justiciary, observed that "it would be wrong… to see the rights under the European Convention as somehow forming a wholly separate stream in our law; in truth, they soak through and permeate the areas of our law in which they apply".[1154] The ordinary approach therefore places an obligation on the domestic courts to start with domestic law, the starting point being native legal principles rather than the judgments of the international court.[1155] The complementary theory holds that it is a mistake to assume that, because an issue appears to fall within the ambit of the ECHR, it automatically follows that the legal analysis should be confined to the jurisprudence of the ECtHR and the HRA. Correctly understood, Convention rights do not form a detached body of domestic law originating in the jurisprudence of the ECtHR.[1156]

While domestic law in most instances mirrors the ECHR, there are instances where it fails to adequately reflect the requirements the UK must fulfil under its international obligations and (or) the obligations imposed by the HRA. The HRA has allowed for several additional mechanisms that allow public authorities to act in a manner that is compatible with Convention rights. The HRA is clearly a significant part of the UK's constitutional landscape. However, as Lord Reed observed in *R (Osborn) v Parole Board*, it does not supersede the protection of human rights under the domestic law or statute or create a discrete body of law based upon the judgments of the ECtHR. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the HRA when appropriate.[1157]

It appears reasonable to submit that rights to property, and the UK's international obligations as a party to the ECHR, should be primarily protected through the existing principles of domestic law. However, it does not follow that the domestic law in all instances mirrors ECHR law. The

[1154] *HM Advocate v Montgomery* 2000 SLT 122, 127 (CJ).

[1155] *Osborn* (n 389) [62].

[1156] Ibid [63].

[1157] Ibid [57].

HRA provides additional tools to allow for more "heroic surgery" to be carried out by the courts.[1158] If the change is significant, then the heroics should be left to democratic institutions.[1159]

An example of "heroic surgery" can be observed in the domestic law in relation to privacy.[1160] While the common law does not recognise a general tort (delict) of privacy, Article 8 explicitly contains the right for private and family law.[1161] While it appears that the courts are not willing to accept that the HRA has created new private law rights and obligations, it has become apparent that the values that underpin fundamental rights have come to influence domestic law.

Guidance on how the courts hope to approach these questions is apparent in the reasoning in the House of Lords' decision in *Campbell v Mirror Group Newspaper Ltd*.[1162] In this case, the well-known model Naomi Campbell was photographed exiting a drug rehabilitation clinic, despite having previously publicly denied attending such facilities. Campbell claimed for breach of confidence and a breach of privacy. In a 3:2 majority (Lord Nicholls and Lord Hoffman, dissenting) the Appellate Committee held that there had been a violation of Campbell's right to privacy. Some Justices turned to tort law or "old" law.[1163] To Lord Nicholls, "The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence".[1164] Baroness Hale observed in *Campbell* that "The [HRA] does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights".[1165] By not giving automatic precedence to the right to freedom of expression, domestic courts have underscored that, while judges are required to consider Convention rights, they do not have automatic priority over domestic law.

A useful metaphor was given by Lord Denning in *Bulmer Ltd v Bollinger*, when he observed that the principles of EU Law were "like an incoming tide. It flows into the estuaries and up the rivers. It

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[1158] R. Reed "Human Rights and Domestic Legal Traditions" in Anderson, Chalmers and MacLeod (eds) *Glasgow Tercentenary Essays* (Edinburgh: Avizandum 2014) p. 172.

[1159] HRA s. 10.

[1160] I. Loveland, "Twenty years later – assessing the significance of the Human Rights Act 1998 to residential possession proceedings" (2017) 3 *Conveyancer and Property Lawyer* 174, 174.

[1161] *Wainwright v Home Office* [2003] UKHL 53.

[1162] *Campbell v Mirror Group Newspaper Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[1163] Ibid [54].

[1164] Ibid [13].

[1165] Ibid [132].

cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law".[1166] Sedley LJ, speaking in 1999, suggested that the HRA deserved its own metaphor — the ECHR should perhaps be viewed as a dye which will colour the fabric of our law except in those places where the fabric is impervious to it.[1167] The problem remains the indeterminacy of when the dye soaks into domestic law and when domestic law is impervious. The result is that human rights in their current form are limited to a rather unwieldy means of identifying objectively gross and disproportionate violations.

This dye has soaked through the entire legislative process at Holyrood. Chapter two noted that the Scottish Ministers and public bodies must undertake their functions in a manner that is compatible with Convention. Similarly, the Secretary of state may make an order prohibiting the Presiding Officer from submitting a Bill for Royal Assent if it contains provisions which they have reasonable ground to believe would be incompatible with international obligations.[1168] The influence of Convention rights is observable throughout the drafting of the rights to buy and the work of the Scottish Land Commission.[1169]

The complimentary theory faces several important challenges. Arguably the most significant is the fundamental difference between the values and theoretical basis of Convention rights when juxtaposed against the values that have shaped private law.[1170] To Dworkin, public law rights are "clubs" or "trumps" that allow the individual protection against the coercive abuse of the state.[1171] Whereas to Collins, private law rights are "diamonds to be traded with other or discarded by choice".[1172]

6.4.1 THE COMPLEMENTARY THEORY ASSIMULATION

The law of equity is alien to the Scots lawyer, so to compare the effect of human rights law in private law to the relationship between the English common law and equity poses a certain set of

[1166] *Bulmer Ltd v Bollinger* [1974] 3 WLR 202 (CA).

[1167] S. Sedley, *Freedom, Law and Justice* (London: Sweet & Maxwell 1999) p. 19.

[1168] SA 1998 s. 35(1); 58(1).

[1169] See SP, OR, RACCE, 7 October 2015, col. 35-51; SP, OR, RACCE, 8 June 2015, col. 9-12; SP, OR, RDC, 8 January 2002, col. 2721 and col. 2718.

[1170] Collins (n 493) p. 25.

[1171] Dworkin, *Taking Rights Seriously* (n 55).

[1172] Collins (n 493) p. 13.

challenges. Despite this, it is submitted that the debates over whether equity and the common law should be assimilated offers a useful lens through which to consider the relationship between Convention rights and private law.[1173]

In very rough terms, equity is a system based on the conscience of the rights holder. Equitable remedies are said to concern fairness and justice between parties. However, this does not mean that all the principles of the common law achieve unfairness or injustice.[1174] Human rights are said to protect the rights of the individual against the state and are rhetorically justified on the same grounds of justice and fairness. Students of English law are accustomed to the phrase "the position is different in equity". If we are to proceed on the assumption that A1P1 complements domestic property law, the question is when, if ever, is it correct to state that "the position is different under the HRA". Put succinctly, when can it be said that Convention rights intervene when the rigidity of the common law does not allow for a remedy that conforms to the principles contained in the ECHR and, in doing so, come to inherently limit the common law?

There is a limit to this argument as the UK is a dualist state. The purpose of the HRA was to fuse the principles of the ECHR in domestic law through the creation of Convention rights. Further, to describe something as traditional common law or domestic rights, can mean the law prior to the enactment of the HRA in 2000, or principles that are considered to have a native origin. However, as was already discussed even prior to the HRA, there was a general presumption in favour of interpreting the law in a manner that was compatible with the ECHR. Added to this is the reality that many of the rights contained in the ECHR have long been protected by the common law. A controversial question to ask is whether the HRA fused the duties of the judiciary to follow so far as possible the jurisprudence of the ECtHR, but in practice this did not fuse the substantive law, and Convention rights and the common law continue to operate in separate spheres.

In Scotland we lack the equivalent of the famous *Earl of Oxford's case*, where the principle that equity takes precedence over the common law was established.[1175] The problem is that there does appear to be a disconnect between the Court of Session and the Supreme Court as to the correct starting point. For example, the Inner House in *Salvesen v Riddell* started their analysis with the

[1173] See P. Birks, "Property, unjustified enrichment and tracing" (2001) 54 *Current legal Problems* 231.

[1174] A. Burrows, "We do this at Common Law but that in Equity" (2002) 22 *Oxford Journal of Legal Studies* 1, 2.

[1175] *Earl of Oxford's case* (1615) 21 ER 485.

traditional tools of statutory interpretation.[1176] The Inner House only turned to the question of legislative competence and Convention rights as a secondary issue. This focus on the traditional canons of construction as the primary interpretative tools appears to be uniform across the Scottish judiciary.[1177] As Lord Drummond Young recently observed in the Inner House decision of *McMaster v Scottish Ministers*:

> Before the Convention can operate, it is first necessary to ascertain what the parties' domestic rights and obligations are and, in a case such as the present, how those rights and obligations have been affected by domestic legislation.[1178]

The issue is that the Supreme Court in *Salvesen* began its analysis with the issue of compatibility with Convention rights.[1179] Thus, there appears to be a disconnect between the interpretative tools used in the Court of Session and those used in the Supreme Court.

As was discussed in relation to the mirror theory, is it clear that this position is not different when considering pre-existing rights.[1180] Where the property has always been subject to the possibility of interference, no interference can materialise if this possibility crystallises and becomes a reality.[1181] A1P1 appears to have the ability to inherently limit domestic law where a statutory provision has modified an existing right to property. For example, in the 2018 Supreme Court decision in *Mott v Environment Agency*, it was the fact that the Environment Agency had changed Mr Mott's existing rights to property by imposing a limit on his leasehold interests in salmon fishing between 2012 and 2014 which was central to the Court's decision.[1182] This was held to be a violation of A1P1, as this modification was not accompanied with the payment of compensation.[1183] If the catch limit had always been part of Mr Mott's leasehold interest, it is unlikely that he would have been able to determine that the limit constituted an interference under A1P1, as this would have been part of a contractual obligation he had accepted, even though the interference (the limit on his catch), which was held in Mott to be incompatible with A1P1, would have been the same. The key point

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[1176] *Salvesen* (IH) (n 87).

[1177] Ibid; *Robertson v HM Advocate*; *Gough v HM Advocate* [2007] HCJAC 63 [165]-[166].

[1178] *McMaster* (IH) (n 5) [21].

[1179] K. Campbell, "At the Intersection of Scottish Agricultural History and Constitutional Law: *Salvesen v Riddell* and the Legislative Competence of the Scottish Parliament" (2017) 38 *Statute Law Review* 298, 308.

[1180] *Sims* (n 68).

[1181] Allen, *Property and The Human Rights Act 1998* (n 25) p. 234.

[1182] *Mott* (n 627).

[1183] Ibid.

appears where an individual's rights to property is interfered with, but they have not given express or tacit agreement to this interference in the normal realms of private law, and the interference is held not to satisfy the six point test discussed above.

It has already been submitted that property in land is best considered akin to a liability rule that entitles a landowner to a monetary payment. While a circular argument would hold that this means that all rights are therefore subject to interference, what we are looking at instead is a change in the nature of a right since its original acquisition. This change cannot be one that has already been expressly agreed to, for example through the form of a lease or contract, but instead denotes a change in character resulting from an act of a public body. This means that A1P1 is engaged by Scots rights to buy, as when an individual's land is subject to an application to buy, or is placed in the register, the content of the owner's rights to property have been altered. This alteration is the result of the community, crofting community, or agricultural tenant utilising Acts of the Scottish Parliament.

6.5 CHAPTER FIVE: CONCLUSIONS

There can be little doubt that the application of human rights has reached the "heartlands of private law".[1184] However, this does not mean that domestic law in its entirety has become inherently limited by Convention rights. The importance of the rights protected in the ECHR should not be in doubt, but in practice, their protection in the UK did not start with the drafting of the ECHR or the enactment of the HRA. Human rights have long been protected in some form in domestic law and continue to be protected. Some scholars are quick to claim that human rights values have always been intrinsic in private law, as the basis of the private law structure are human rights standards such as individual autonomy and dignity.[1185] While this may be partially true, a note of caution is necessary, as this is to pick and choose from history. The development of property law, particularly the private ownership of land, has arguably not been grounded just in individual autonomy and dignity, but has also preserved power and class structure. As Linklater asserted, "[t]he idea of individual, exclusive ownership, not just of what can be carried or occupied,

[1184] F. du Bois, "Private Law in the Age of Rights" in E. Reid and D. Visser (eds) *Private Law and Human Rights* (Edinburgh: Edinburgh University Press 2013) p. 12.

[1185] Barak (n 771) p. 21.

but of the immovable, near-eternal earth, has proved to be the most destructive and creative cultural force in written history".[1186]

The HRA did not create a new or discrete body of case law based solely upon the judgments of a supranational court. Instead, domestic law has been developed in accordance with existing principles and values. If "heroic surgery" is required to remedy a deficiency in domestic law, then to remain compliant with the UK's international obligations, domestic law may become inherently limited. The role of the ECtHR to act as a guiding hand remains pivotal.[1187] However, it must not be forgotten that land lawyers are private lawyers, and thus the majority of land law regulates the legal relationship between individuals and rights to property. Public law and human rights law have not swallowed up private law.

The realisation that the application of A1P1 is not observable in a binary fashion leaves the hanging question of in what circumstances it can be correct to state that "the position is different under the HRA". The risk is that litigators and the courts are left like night watchmen looking out for icebergs (Convention rights), without realising that the principles of domestic law should resolve the dispute. Or, on the contrary these parties find themselves stuck in domestic law to try and resolve their predicament. This risks a false sense of complacency, that domestic property law is compliant, results in interpretations that later transpire to be incompatible with Convention rights.[1188] Further, there is the risk of "double accounting", where the inability to determine whether Convention rights are applicable to what would have traditionally been a private law dispute, results in protracted proceedings as the parties attempt to rely on public law and private law rights that simply mirror the same principle. The submission that pre-existing rights cannot engage A1P1 is borne out in domestic case law, but it still does not give a definitive answer as to when A1P1 has the ability to inherently limit domestic laws.

The result is that it is not possible to produce a verifiable proof in which the substantive hierarchy between Convention rights and private rights is discernible. Instead, this is left to the judiciary when dealing with submissions. The problem is that domestic courts have shown a determination to avoid direct discussion of the relationship between private law and Convention rights.

[1186] A. Linklater, *Owning the Earth* (London: Bloomsbury 2013) p. 5.

[1187] Collins (n 493).

[1188] A. Goymour, "Property and Housing" in D Hoffmann (ed), *The Impact of Human Rights Acts on Private Law in England and Wales* (Cambridge: CUP 2011) p. 291.

7 CONCLUDING CHAPTER

This thesis has examined the application and effect of A1P1, within the wider human rights paradigm, to the contemporary community, crofting, and agricultural rights to buy in Scotland. In doing so, it has filled a notable gap in the available literature and added a level of impartiality that has been largely absent from the current discourse.

The aims of this thesis were: (i) to question why Scotland is undertaking a process of distributive land reform and to understands the legislative methods used; (ii) to determine what rights, and whose rights, are engaged; (iii) to trace the development of A1P1 and set out a framework within which questions of compatibility can be determined, before critiquing the fitness of this framework; (iv) to apply the framework of A1P1 to Scots rights to buy to determine whether contemporary reforms are compatible with the Scottish Ministers devolved competencies and to see what lessons this gives on the application and effectiveness of A1P1; and, (v) to consider what effect A1P1 has had on domestic law and to consider the vexed question of when, if ever, can the application of A1P1 result in a remedy that would not have been available to the applicant.

7.1 CHAPTER ONE: THE LAND QUESTION AND LAND REFORM

The first objective of this thesis was to consider why the Scottish Government was instituting a program of land law reform. Chapter one concluded that the driving force behind contemporary reforms can be reduced to four primary factors: first, the rhetoric of historical injustice; second, absentee ownership and tax avoidance; third, the high concentration of ownership; and fourth, an ideology of egalitarianism. Part 2 of chapter one then set out six rights to buy enacted by the Scottish Government. It was submitted that Scotland is serving as a particularly useful lens through which to analyse the relationship between human rights and property law. This is because property as a human right has come to be scrutinised at a political level that is not observable in the rest of the UK.

7.2 CHAPTER TWO: WHAT RIGHTS AND WHOSE RIGHTS

The second objective of this thesis was to locate the right to property. Chapter two illustrated that any Act of the Scottish Parliament is not law so far as it is incompatible with any of the Convention

rights.[1189] Members of the Scottish Government have no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with Convention Rights.[1190] It was submitted that when carrying out functions of a public nature, this requirement extends to crofting and community bodies.

This chapter submitted that the Scottish Ministers have the devolved competencies to make reference to the ICESCR and other relevant non-convention rights. However, while socio-economic rights may be justiciable, the Scottish Ministers' inclusion of the ICESCR into its definition of "other rights" does not constitute an implementation by domestic legislation. It was argued that if circumstances were to arise in which more than one compatible interpretation of A1P1 was open to the Scottish Ministers, they would be required, in choosing between those options, to have regard to relevant non-convention rights. Despite this, it was asserted that this does not allow for the limiting or reinterpretation of A1P1 to the extent that such an interpretation is incompatible with the A1P1.

7.3 CHAPTER THREE: ARTICLE 1 OF THE FIRST PROTOCOL

The third objective of this thesis was to consider how to interpret A1P1. Chapter three approached the often-conflicting jurisprudence of the ECtHR through the organising structure of six distinct tests. It illustrated the broad category of individuals that will constitute a victim. It noted how the ECtHR has given "possession" an autonomous meaning and thus domestic courts have to disassociate possession from its normal domestic use. It proceeded to outline the three rules in *Sporrong*: interference, deprivation, and control of use. The primary determinant factor for categorisation in Strasbourg appears to be the requirement of compensation. Chapter three then considered the tests when A1P1 is *prima facie* engaged. It noted how interferences must be "lawful", which the ECtHR has interpreted as requiring domestic law to be sufficiently accessible, precise and foreseeable. Chapter three outlined the public interest test and noted the wide margin of appreciation given to member states, bordering on a fourth instance interpretation. As such, the public interest test as a standard of review is a paper tiger. The final, and most important standard of review is the proportionality requirement. This thesis chose to take a rule-based approach (matching the jurisprudence of the Supreme Court) and broke down proportionality into a four-

[1189] SA 1998 s. 29.

[1190] Ibid s. 57.

part test. First, there must be a legitimate aim. Second, the measure adopted must be rationally connected to that aim. Third, it must be considered whether an aim could have been achieved by a less intrusive measure. Fourth, whether a fair balance has been achieved, often called results proportionality or *stricto sensu*. Central to the fair balance test is the principle of equivalence.

7.4 CHAPTER FOUR: APPLY A1P1 TO CONTEMPORARY RIGHTS TO BUY

It was submitted that a relatively broad category of claimants would satisfy the victim requirement. It was argued that the primary determining factor for determining whether an applicant held a "possession" within the meaning of A1P1 was the existence of an economic asset. In relation to Scots rights to buy this extends beyond landowners, but to anyone with an economic interest in land or related rights.

It was shown how the categorisation of an interference will remain important to any application under A1P1 due to the presumption of compensation when a deprivation is established. It was submitted that the registration of a community right to buy, and the automatic registration of all AH(S)A 1991 tenancies for the tenant's right to buy, constitutes a control of use. Further, it was shown, how when utilised, the rights to buy extinguish the landowner's existing rights. As a result, this constitutes a deprivation under A1P1. The problem, as exemplified by the Supreme Court decision in *Mott*, and the Inner and Outer House decisions in *McMaster,* is determining the Rubicon that has to be passed for an interference to constitute a deprivation and not merely a control of use. The ECtHR jurisprudence appears to point towards the extinction of all rights relating to property, but the domestic courts point towards a standard that is closer to a loss of all beneficial use. It is hoped that the decision in *McMaster* will be appealed to the Supreme Court and some guidance will be given. However, it was conceded that the exact point when a control becomes a deprivation will in many instances remain clouded in legal and political rhetoric.[1191]

Chapter four argued that while the lawfulness requirement remains a preliminary hurdle, the Scottish Ministers are not given unlimited discretion. As such, questions remain over the meaning and application of several key terms. Chapter four also reiterated that the "public interest" test is synonymous with the doctrine of the margin of appreciation, and as such, it is highly unlikely that contemporary reforms will be held contrary to the "public interest" within the meaning of A1P1.

[1191] See *McMaster v Scottish Ministers* [2018] CSIH 64. On 18 September 2018 the Inner House refused to grant permission to appeal to the Supreme Court.

It was submitted that the poorly defined nature of community does pose the risk of a community right to buy being utilised for a wholly private purpose. However, it was conceded that the courts are unlikely to ever find there to have been an interference that is not in the public interest.

It was submitted that the four-part proportionality test is where A1P1 has the ability to offer some bite. The first two stages of the proportionality standard require there to be a legitimate aim and that this aim is rationally connected to the interference with individual rights. These two stages remain tempered by the margin of appreciation and the domestic courts preference to give weight to democratic institutions. Utilising the two-tier approach of undertaking a macro-granular and micro-granular approach it was submitted that it is unlikely that the existing reforms will be held incompatible when undertaking a macro approach. For example, it is unlikely that the existing reforms will be held to not constitute a legitimate aim, and the domestic courts will be notably apprehensive to find that legislative measures are not rationally connected to a legitimate aim.

The third rule requires the court to consider whether the ends sought could have been achieved by a less intrusive mechanism. It was shown how part three exposes the differing standards of review between Strasbourg and domestic courts. While the ECtHR will be loath to intervene, domestic courts, particularly relating to Acts of the Scottish Parliament, will be more likely to undertake a micro-granular review. It was submitted that parts 2 and 3 combined, impose a duty on the Scottish Ministers to rationalise their decisions to consent to a right to buy. The mirco-granularity of the evidence considered by the court will be an important determining factor, particularly as the judiciary will consider the individual circumstances before it and mot merely the overall purpose of the legislation.

The final part of the proportionality requirement requires a detailed micro-granular approach as the courts seek to balance of individual and collective rights. Central to this is the payment of compensation, as this is thought to redress the imbalance and inhibit one individual bearing an individual and excessive burden. It was submitted that the principle of equivalence will serve as the primary limiting factor to the Scottish Ministers obtaining their goal of 1 million acres in community ownership in 2020. Chapter four then argued that A1P1 does not guarantee full compensation in all circumstances. As such, it was shown how a framework that takes into account the nature of the resource, the personhood value of the property, and the social context within which it is held could be used to reduce compensation below market value in very confined circumstances. However, it was argued that reducing compensation below market value would not

only risk constituting a violation of A1P1, but would undermine the land reform agenda and help to fuel the narrative that the Scottish Ministers are undertaking a land grab.

It was submitted that the Scottish Ministers and judiciary, when considering the fair balance, should give weight to the relevant non-convention rights, particularly the ICESCR. It was argued that Scotland should turn to South African jurisprudence, where post-Apartheid constitutional law has focused on the indivisibility of human rights. This submission was made with the caveat that the weight given to the non-convention rights cited in the CE(S)A 2015 and the LR(S)A 2016 cannot allow for the reinterpreting of the right to property to the extent that it is incompatible with A1P1.

Chapter four concluded that the existing binary debate, that asks whether A1P1 will serve as a red card to contemporary rights to buy, fundamentally misunderstands how A1P1 works in practice. It was submitted that the broad margin of appreciation, and the weight given to democratic institutions in domestic law means that the legislation in its existing form is unlikely to be held incompatible with A1P1. The question to be determined by future case law is whether a particular right to buy can constitute a disproportionate interference under A1P1. It was submitted that this question will turn on the level mirco-granular evidence accepted by the Scottish Ministers and the circumstances of the individual(s) whose rights have been interfered with. Chapter four set out several potential flashpoints that are likely to arise, including questions of compensation and the potential that a right to buy will impose an individual and excessive burden on the landowner. The problem, as discussed in detail, is the multidimensional nature of competing claims to land and the risk of incommensurable values. The Scottish Ministers and judiciary cannot be expected to resemble Dworkin's conception of the all-knowing judge Hercules. However, it is submitted that through a detailed rules-based approach to A1P1 they can attempt to undertake their decision making in an independent discretionary manner. If followed, correctly, A1P1 will act as a hurdle that prohibits the arbitrary use of the rights to buy. It will not, however, act as a red card to underlying public policy goal of progressive land reform.

7.5 CHAPTER FIVE: PRIVATE AND PUBLIC RIGHTS TO PROPERTY

Chapter five considered what effect A1P1 has had on domestic property law. It was illustrated that the HRA did not create a new or discrete body of case law based solely upon the judgments of a supranational court. Instead, domestic law has been developed in accordance with existing

principles and values. If "heroic surgery" is required to remedy a deficiency, then to remain compliant with the UK's international obligations, domestic law may become inherently limited. However, it must not be forgotten than land lawyers are private lawyers and thus the majority of land law regulates the legal relationship between individuals and rights to property.

Instead, A1P1 has a pervasive influence on the entire workings of all public bodies and like a dye permeates the legislative process. By utilising the English experience concerning the possible assimilation of equity the question was posed "when is the position different under the HRA". The answer to this determines when Convention rights have the ability to inherently limit domestic law, the problem is that there is only limited guidance.

It was submitted that domestic law is impervious to the dye of A1P1 when considering pre-existing rights. Where the property has been always subject to the possibility of interference, no interference can materialise if this possibility crystallises and becomes a reality. A1P1 appears to have the ability to inherently limit domestic law where a statutory provision has modified an existing right to property.

7.6 CONCLUDING POINTS

This thesis has submitted that A1P1 should not be viewed as an open or shut gate to contemporary rights to buy. Instead, A1P1 should be conceptualised as more akin to a necessary hurdle. The merits of an application should be seen as six rules (blocks) that when placed on top of each other allow community, crofting community, and agricultural tenants to easily walk over the hurdle. The doctrine of the margin of appreciation and the weight given to democratic institutions means that several of these blocks, most notably the public interest requirement, are already firmly fixed in place. The second to last block requires the Scottish Ministers to rationalise their decision to allow a right to buy. The last block, will often be the most exacting and expensive block to add as it requires the payment of compensation. However, as was argued in chapter four, in certain very confined circumstances, compensation under A1P1 does not necessarily mean full compensation. The recognition that A1P1 does not exist in isolation does not alter the hurdle, but relevant non-convention rights should be utilised as part of the establishment of the final proportionality block. Further, the Scottish Ministers lack the devolved competencies to remove the hurdle or reduce its height. The hurdle of A1P1 should not be ignored because it serves that justifiable purpose, prohibiting the arbitrary

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